

**REPORTS OF A
PORTION OF THE
DECISIONS
RENDERED BY
THE SUPREME...**

Hawaii. Supreme Court





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REPORTS

OF A

PORTION OF THE DECISIONS RENDERED

BY THE

SUPREME COURT,

OF THE

HAWAIIAN ISLANDS,

IN

LAW, EQUITY, ADMIRALTY AND PROBATE.

1857-1865.

BY ROBERT G. DAVIS,

JUSTICE OF THE SUPREME COURT, AND MEMBER OF HIS MAJESTY'S
PRIVY COUNCIL OF STATE.

HAWAIIAN REPORTS, VOL. II. *c f*

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1866.

Rec. March 29, 1878

JUDGES
OF
THE SUPREME COURT

DURING THE PERIOD OF THESE REPORTS.

HON. ELISHA H. ALLEN, K. C. K.,
CHANCELLOR AND CHIEF JUSTICE.

HON. GEORGE M. ROBERTSON, K. C. K.,
VICE CHANCELLOR AND FIRST ASSOCIATE JUSTICE.

HON. JOHN II,
SECOND ASSOCIATE JUSTICE.

HON. ROBERT G. DAVIS

Was appointed *Second Associate Justice* on the 16th day of February, A. D. 1864, in place of Mr. Justice II, who had resigned.

ATTORNEY GENERAL,
HON. CHARLES C. HARRIS, K. K.

ERRATA.

Page 104—26th line, read "his nation," instead of "this nation."

Page 594—27th line, read "proposition," instead of "proportion."

Page 619—31st line, read "preposition," instead of "proposition."

Page 673—9th line, read "down," instead of "done."

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SUPREME COURT.

JANUARY TERM—1857.

JOHN C. JONES *vs.* JOHN MEEK.

An award of a lot of land by the Board of Land Commissioners, by metes and bounds, does not extinguish a right of way passing through a portion of such lot, and enjoyed by the defendant up to the time the award was made.

A right of way merely is not, properly speaking, a claim for land, and it was not necessary for the preservation of such right that a specific claim should be presented to the Land Commissioners for confirmation.

A non-user of the easement for the term of five years would raise a presumption of an abandonment, particularly if the servient tenement had passed into the hands of a purchaser without notice of the easement.

The owner of the dominant tenement must enjoy his right of way over the servient tenement in such a manner as not to interfere unnecessarily with the rights of the owner of the latter.

Judge ROBERTSON delivered the decision of the Court as follows :

This is an action brought by the plaintiff at the last term of this court to recover possession of a strip of land, about ten or twelve feet wide, by seventy feet in length, with damages for its wrongful occupation by the defendant. The parties waived a trial by jury, and submitted the case to the decision of the Court, with the understanding that judgment might be given during the vacation, as of the last term.

The strip of land in question is comprised within the boundaries of a lot, situated on the northeast side of Marin street, in Honolulu, awarded, by the Board of Land Commissioners, on the 15th of April, 1851, to Francis Jones, Rosalie Jones, and John C. Jones, heirs of Lahilahi Marin, under claim No. 810. Francis Jones died in 1850, having devised all his real estate, including his undivided interest in this lot, to the plaintiff, who by a decree of partition, made on the 23d of April, 1853, between him and Rosalie, became sole owner of said lot.

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It appears that in ancient times this lot was the property of the late Don Francisco de Paulo Marin ; that over it run a public highway, some twenty feet wide, nearly in the line of the strip of land now in dispute, trending off in a northwesterly direction along the *mauka* side of the lot ; and that the said Don Francisco Marin gave the portion of the lot which lay on the western side of the highway to his daughter Lahilahi, and the part which lay on the eastern side to Miele, another of his daughters, who lived, according to ancient custom, with Capt. Thomas Meek, the defendant's brother. After Thomas Meek left the kingdom, the eastern part of the lot came into the possession of Lahilahi Marin, in some way which does not now clearly appear. Capt. Thomas Meek was the owner of a lot, now owned by defendant, abutting on one side upon the old highway and the land of Don Francisco Marin, and on the other side upon King street, for which lot the defendant obtained a Royal Grant on the 3d of September, 1839. In or about the year 1839, when the present streets of Honolulu began to be laid out, Governor Kekuanaoa ordered the old highway to be closed, and a dispute having arisen between Lahilahi and the defendant, about the possession of a strip of land over which the highway ran ; the Governor, in settling the dispute, divided the strip of land which lay between the lots of the parties, and Lahilahi moved out her stone fence accordingly. The Governor directed that the eastern half of that part of the highway, which ran through Lahilahi's land, from what is now Marin street up to a gate on the *makai* side of defendant's lot, should be left open as a private way for the use of defendant and his people in common with Lahilahi and her people, in which arrangement, the Governor testifies, that Lahilahi acquiesced. One of the plaintiff's witnesses, who was present, states that defendant appeared to be excited and displeased about the arrangement, and said several times that they might shut up the whole strip, for he did not wish to have it open. Some time afterwards the defendant complained to the Governor that Lahilahi was attempting to shut up the way, and the Governor told the defendant to tear down any obstructions that Lahilahi might erect, and keep the way open in accordance with his decision. Again, in 1845, the dispute was renewed, and the

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Chiefs in council appointed the late Mr. Richards and some other person to settle it, which they did by re-affirming the decision of the Governor. Mr. Metcalf testifies that, when he came here, in 1842, the way was open through to defendant's gate; that he frequently passed in to defendant's premises by that way; and that on one side of it stood the fence of Lahilahi, and on the other side a stick fence. It appears that, in 1843, Lahilahi erected two grass houses so as partially to obstruct the way, and about the same time walled up the end nearest to Marin street, thus entirely preventing the defendant from using it. The grass houses were consumed by fire in 1850, when the defendant immediately re-asserted his right of way through to Marin street, and has ever since kept it open. In 1854, the defendant erected a high wooden fence along the eastern side of the way, parallel with the old stone fence, and placed a gate at the end nearest Marin street, so as completely to enclose the alley. The gate has also been locked usually every night by defendant's direction. The plaintiff claims that by these acts the defendant has wrongfully taken possession of the strip of land to the exclusion of plaintiff's rights.

The first question to be determined is, has the plaintiff established his title to the strip of land in question? We think he has done so, conclusively. We have already stated how he became solely possessed of the entire interest in the lot which was formerly held by the three children of Lahilahi, of whom he is one, as tenants in common. The award to them, by the Board of Land Commissioners, of the entire lot, by metes and bounds, including the strip in dispute, being made without any reservation of, or counter-award for, any rights of the defendant, or any other third party, within those metes and bounds, is conclusive as to the title, against all the world. An instance of such a reservation and counter-award as is here indicated, will be found in the case of *Kalama vs. M. Kekuanaoa and John Ii*, recently decided in this Court, where the Land Commission, while adjudging that the Government owned the entire premises in fee simple, reserved for and awarded to Kailio a right of residence for life on one third part. (See *Polynesian* of February 28th, 1857.)

It is contended, however, on the part of the defendant, that

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the decision of the Governor, in 1839, requiring Lahilahi to leave open a way for defendant's use, vested in him either the absolute fee in the soil, or at least a right of way over it. While we are clearly of opinion that the Governor's decision did not vest the fee of the land in the defendant, we think it unquestionably amounted to a valid grant of a right of way, in favor of the tenement owned by the defendant, which right attached upon the servient tenement, in the possession of Lahilahi. But, says the plaintiff, admitting that the Governor's decision did give the defendant a right of way, that right was annihilated by the award of the Land Commissioners, in 1851, which reserves nothing. We think this is an unsound argument, for, if the defendant still had a right of way up to the time that the award was made, such right was not extinguished by the award, inasmuch as it was not necessary to the preservation of a right of way, that a specific claim for such right should be presented to the Land Commissioners for confirmation. Their main business was to adjudicate upon titles to land; but a claim to a right of way merely, which gives no title to the soil, but only a right to pass over it, is not, properly speaking, a claim for land. Undoubtedly the Board of Land Commissioners did, incidently, adjust and settle, in many cases, disputes in regard to rights of way, rights of piscary, and water privileges; and had the parties in this instance submitted the claim for a right of way to the adjudication of the Board, as incident to the settlement of their land claims, we think its decision would have been binding. The defendant has proved that, in May, 1847, he presented his deed, dated 3d September, 1839, to the Land Commission, together with a survey of his lot, which he had procured to be made by Mr. Metcalf, on which survey defendant had a memorandum made, to the effect that his lot had the privilege of a road twenty-five feet wide, over plaintiff's land; and that sometime afterwards the Commissioners gave him leave to withdraw his papers, the President, Judge Lee, having told him that any action of the Board upon his claim was unnecessary, as they could give him no better title than he already possessed, under his grant from the King and Premier. This cannot be construed into a confirmation, by the Land Commission, of defendant's claim to a right of way,

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twenty-five feet wide, but had the defendant allowed his claim to remain before the Board, to be considered and decided in connection with the claim of Lahilahi's heirs, the Board might in that case have examined and settled the claim for a right of way, as an incident to the land claims of the parties. As it is, the defendant's claim for a right of way was not affected, favorably or unfavorably, by the action of the Land Commissioners.

It is contended, on the part of the plaintiff, that the defendant lost his right to the easement which he claims by non-user, and that there is evidence sufficient to raise the presumption of an abandonment of the right on his part. It is not shown, says the plaintiff, that when Lahilahi built the two grass houses on the alley, in 1843, and walled up the end of it which communicated with Marin street, the plaintiff resisted the erection of these obstructions, or took measures to maintain his claim; on the contrary, it is proved that for a period of about five years, he ceased to enjoy the right of way, and it became extinct. If it appeared clear to us that the non-user for a period of five years had been voluntary on the part of the defendant; that he knew and acquiesced in the disturbance of his easement on the part of Lahilahi; and that he failed, for so long a period, being under no disability, or absent from the kingdom, to assert his right by legal steps, we should be inclined to hold that the presumption of an abandonment on his part did arise, and that he had lost his right, particularly if the servient tenement had passed into the hands of a purchaser having no notice of the easement. But such is not the case. On the contrary, it is clear from the fact that, in 1845, the Chiefs in council appointed a committee to settle the renewed dispute, which committee re-affirmed defendant's rights, that he did not acquiesce in the acts of Lahilahi, and that he had re-asserted his right of way. While it also appears, by the testimony of Mr. Metcalf, that in April, 1847, defendant still had a gateway opening into the alley, which his son unlocked to let Mr. Metcalf pass through, for greater convenience in making the survey of the premises, and upon Mr. Metcalf's enquiring why he kept the gate locked, he answered, that he did so to prevent the passage through his premises from being made a thoroughfare. We think it is clear, therefore, that defendant has neither lost, nor abandoned his right of way, and that it is a good, subsisting right at this day.

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But it is contended by the plaintiff, that even if defendant has a right of way, he is still a trespasser, for the right to the easement gives him no authority to enclose and assume possession of the land over which the way passes, without the consent of the owner of the fee. This is unquestionably correct, and while the owner of the dominant tenement cannot be disturbed in the proper enjoyment of the easement, he must enjoy it in such a manner as not to interfere, unnecessarily, with the rights of the owner of the servient tenement, for every privilege in derogation of the rights of the owner of the land is viewed with jealousy by the law, and is confined to the limits and objects prescribed by the grant. (Taylor vs. Hampton, 4 McCord, 96, cited in Gale & Whatley on Easements, 264, Note 2.) There can be no doubt, we think, that in dividing the strip of land in question, by a fence, from the other parts of plaintiff's lot, and in erecting a gate at the lower end of it, which gate is locked in the night time, whereby the defendant has assumed control over the land, to the exclusion of the plaintiff's right to pass and repass over it by night or day, and to use it at all times in such a way as not to disturb the defendant's easement, the defendant has done such acts as amount, in law, to an ouster of the plaintiff. Lord Coke says: *Disseisnam satis facit, qui uti non permittit possessorem, vel minus commode, licet omnino non expellat*. He makes disseisin enough, who hinders possession to be enjoyed, or less fitly, though he does not expel altogether. (Thomas' Coke's 1st Inst., vol. 3, p. 3.)

The last question to be considered is, as to the amount of damages, which the plaintiff is entitled to recover, for the wrongful dispossession. In our opinion, the actual value of the strip of land in question to the plaintiff can be but small, so long as the defendant has a right of way over it. The only way in which, it would seem, plaintiff can derive benefit from it, is by the use of it as a passage through the centre of his lot, thus facilitating the egress and regress of tenants on the *mauka* part of it. It does not appear that, even in this way, plaintiff could have derived any benefit from it heretofore, and therefore we think he is not entitled to recover any thing beyond nominal damages. It is claimed that he is entitled to recover his reasonable expenses, for counsel's fees, and other disbursements.

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incurred in prosecuting his rights. We are aware that a party after a recovery in ejectment, bringing a suit for mesne profits, will recover as part of his damages, the costs of the ejectment suit ; but we are not aware of any instance in which any thing beyond the taxed costs have been allowed. In this country the plaintiff sues both for possession of the premises, and for mesne profits or damages, in one suit, and a judgment in his favor for the possession carries costs with it as of course.

Our judgment is, that the land in dispute belongs to the plaintiff, but that the defendant has a right of way over the same ; and that plaintiff recover possession of the land, with one dollar damages, and the costs of this suit.

MARCH 24th, 1857.

Mr. Harris for plaintiff.

Mr. Campbell for defendant.

SUPREME COURT—IN BANCO.

JONA PIIKOI *et als.* vs. JONA KAPENA.

A BARE possession, without title, may enable the plaintiff to maintain his action, as against a mere stranger or wrong-doer, but is not sufficient as against the Government purchaser of the land, who has acquired that general property, which draws to it the possession.

Judge ROBERTSON delivered the decision of the Court, as follows :

This is an action of trespass, brought by the plaintiffs, for the purpose of trying the title to a piece of land in the Ili of Puiwa, Kaneohe. The plaintiffs claim the piece of land in question, as a part of a large tract, called "Kekele," leased by the King and Premier to Boaz Mahune and others, for a pasture land, on the 9th day of August, 1839, for the term of fifty-five years. The defendant claims it as being embraced within the surveyed boundaries of a part of the Ili of Puiwa, purchased by him from the Government, and granted to him by Royal Patent, on the 24th of December, 1849.

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The lease to Boaz Mahune and others was not accompanied by any survey of the land demised, but its boundaries are described by natural marks, and by the names of surrounding lands. That part of the boundary where the present dispute has occurred, is defined as follows : " Mai Keloikeanuenue, holo pololei aku la a hiki i Puiwa, a malaila aku a hiki i Puuohala." This part of the boundary of the land held by plaintiffs is so indefinitely set forth in their lease, that its description may well consist with the claim of either the plaintiffs or the defendant, to the piece of land now in dispute. We must therefore look beyond this description, to the evidence adduced at the hearing in order to ascertain whether or not the disputed land was included in the lease to Mahune and others.

On the one hand, Keawe, who is a *kamaaina* of Kaneohe, testifies that a part of Puiwa lies within the boundaries of " Kekele;" and that the place in dispute was in the possession of the lessees of " Kekele," from the date of their lease up to the time that defendant purchased the remaining part of Puiwa. John Watson testifies that he has lived in the district of Koolaupoko since the year 1847; that in that year Piikoi sub-leased two hundred acres of the land held by the plaintiffs to Mr. W. H. Stevens, including the piece of kula land now in dispute; and that he understood the boundaries of plaintiffs as extending down to, and even including a part of, the kalo land of Puiwa. Kealo testifies that he has lived on " Kekele " since the time it was leased to Mahune and others; that from the year 1850 to the middle of 1855, he was Luna of the land for the lessees; and that Kekuku, who had charge of Puiwa for the King, previous to the date of defendant's purchase, never cultivated any part of the dry land. Kahooilimoku, the present Luna of the lessees of " Kekele," testifies that the boundary between the parties runs along the edge of the kalo land; but his acquaintance with the locality appears to be of so recent a date, that we do not consider his testimony of any weight on the subject of boundary.

On the other side we have the testimony, first, of Mr. S. P. Kalama, who testifies that he made the survey of the land now owned by defendant, for the Government, in the year 1849; that before making the survey, he was ordered by the Minister

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of the Interior to examine the boundaries carefully, with a view to avoid any encroachment on the land of the plaintiffs; that on going to the spot for that purpose, the boundary where the present dispute occurs was pointed out to him by Kekuku, the Luna of Puiwa under the Government,, and by D. Kawana, late District Justice of Koolaupoko, and at that time Konohiki of one of the lands adjoining Puiwa; and that he made the survey accordingly. Kahina testifies that he was born and brought up on Puiwa, which land, he says, his father held under Kamehameha I; that since 1839 he has lived alternately at Kaneohe and at Honolulu; that Kekuku was his brother-in-law, and he knows that Kekuku cultivated the same piece of land which is now in dispute, when he was Luna of Puiwa; and that the boundary on that side of the plaintiffs' land was described to him by Nahinu, one of the original lessees, as commencing at Keloikeanuenue, and running thence to Puiwa Kawa, and from thence on to Puuohala by a path, or road, which passed over the kula land near the brow of the pali, in a direction which, as pointed out by the witness on the plan, left the piece of land in dispute outside of the plaintiffs' line.

After mature consideration of the testimony, and of the means of knowledge and information enjoyed by the respective witnesses, we are of opinion that the weight of evidence preponderates largely in favor of the defendant, and that the plaintiffs have failed to prove that the piece of land in dispute, where their cattle have been taken *damage-feasant*, by defendant's agent, is included within the boundaries of "Kekele." The fact that the boundary as described to Kahina previous to 1848, by Nahinu, himself one of the original lessees, coincides so exactly with the boundary pointed out to the Government Surveyor in 1849, by Kekuku and Kawana, far outweighs any testimony adduced to the contrary.

We understood it to be contended on behalf of the plaintiffs that they have proved a continuous possession, for fifteen years, which, it is argued, is sufficient to gain them a title by occupation. The evidence of continuous possession, however, is contradicted by the testimony of Kahina as to the cultivation of the place in dispute by his brother-in-law. But, granting that the plaintiffs did hold possession for fifteen years, it would seem

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to be a novelty for them to claim that they had acquired an estate for a *term of years*, by long occupation. And we presume this is all they do claim, for, if they claim the land in fee simple, they must produce either a Land Commission Award, or a Royal Grant, as a foundation for their title.

It is further contended on behalf of the plaintiffs that, even if the land in dispute was not included in their lease, yet, if they were in possession of it at the time the defendant entered on it and commenced cultivation, his entry was a trespass, and their possession was sufficient to enable them to maintain their action. We think this is unsound, for, although such bare possession might enable the plaintiffs to maintain their action, as against a mere stranger or wrong-doer, it could not be sufficient to sustain their action as against the defendant in this case, he having purchased the land from the Government, and acquired that general property which draws to it the possession, in the absence of any intervening adverse right of enjoyment. If the plaintiffs took possession without the consent of the owner, that owner had a right to resume possession at pleasure, and the right of the owner passed to the defendant by virtue of his purchase.

Let judgment be entered for the defendant, with costs.

J. W. Marsh, Esq., for plaintiffs.

R. G. Davis, Esq., for defendant.

SUPREME COURT—IN ADMIRALTY,

PHILLIP DODGE vs. ELIAS HEMPSTEAD, AND I. HEPPINGTON.

A Seaman leaving his ship in the course of the voyage, without objection from the Master, is not guilty of such a desertion as would work a forfeiture of wages earned antecedently to his quitting the ship.

But having left the ship of his own free will, without just cause, such seaman is not entitled to any wages for the remainder of the voyage.

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Suits for damages, founded on trivial causes, to be discountenanced; but where the complainant makes out a clear case of wrong and injury, the Court would not hesitate in its discretion to award suitable damages.

Judge ROBERTSON, acting as Chief Justice, gave judgment as follows:

The libellant in this cause, who was lately third officer on board of the whaling bark "Harmony," brings this suit to recover, from the respondent Hempstead, the master of said ship, wages which the libellant claims to be due him, as by agreement, viz.: one-fortieth share of all the oil and bone taken by the said ship during her late cruise to the northern seas. Libellant also claims to recover damages against both the respondents, for an unjustifiable assault and battery, which he alleges them to have committed upon his person, on board of said ship, on or about the fourth day of July last, while at sea.

Against the claim for wages, it is contended on the part of Captain Hempstead, that the libellant deserted from the vessel while in the course of prosecuting her cruise, on the seventh day of September; and that he thereby forfeited, under the rules of the maritime law, all right whatever to any wages, either before or after the time of his desertion.

It appears by the testimony, bearing upon this part of the case, that, about two months after the occurrence of the alleged assault, while the ship was lying in Shantar Bay, Capt. Hempstead being dissatisfied with the libellant because he did not succeed, either from unskillfulness, or some other cause, in capturing whales, while the other officers were successful in doing so, disrated the libellant from his position as third mate, and told him he might either go and steer the second mate's boat, or go in the fore-castle and pull an oar. Upon libellant's replying that he had done his best to get whales, and that rather than be sent to pull an oar in another officer's boat, he would prefer to go on shore. Capt. Hempstead replied, as testified by Mr. Wilfong, the second mate, "you can go ashore;" and, upon libellant's rejoining that he was not the worst man in the ship, the Captain said, "if you don't quit grumbling to me, you will be the worst man in the ship." Nothing further appears to have been said on the subject until the boats were preparing to lower after whales, when Mr. Wilfong, observing the libel-

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lant placing his luggage in the waist boat, said to him, "if you are going to steer my boat, you cannot take these things with you." Mr. Wilfong then asked Capt. Hempstead whether libellant was going on shore, or going to steer the waist boat; to which the Captain replied, in substance, that libellant should go and steer the boat; adding, however, to Mr. Wilfong, that if the libellant left the boat and stayed on shore, he need not take any trouble to bring him off. Libellant did not go on shore, but went on board the brig "Hawaii," of this port; and having requested his clothes to be sent him from the "Harmony," his request was complied with.

There is no doubt that, to the grave offense of desertion, the maritime law attaches the extraordinary penalty of the entire forfeiture of all wages antecedently earned by the deserting party. But it is equally clear that, in order to constitute a desertion, in the sense of the maritime law, there must not only be a quitting of the ship and her service, against the duty of the party, and with the intention not to return, but such quitting must, further, be without leave—unauthorized.

Now, was there such a quitting of the ship and her service by the libellant? Were the circumstances under which he left the "Harmony," such as to show that his leaving her was clearly against the will of the master? I think not. On the contrary, I think the language and conduct of Capt. Hempstead was such as to show plainly that he was altogether indifferent as to whether the libellant left the ship, or not; and such as to fully justify the libellant in believing that he had Capt. Hempstead's consent. I am, therefore, of opinion that the libellant was not guilty of desertion; and that he did not forfeit his right to wages earned antecedently to his quitting the ship; which portion of wages, I understand, Capt. Hempstead has tendered, or is ready to pay.

But the libellant claims to be paid his share of the ship's catchings, subsequent to the date at which he left her. The precise ground upon which the libellant bases this part of his claim, does not clearly appear; unless, indeed, it be upon the ground that he was forced to leave the ship, by reason of excessive ill treatment, which, I think, cannot be successfully contended on the facts in the case. There is no evidence that

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the libellant received any harsh treatment during the two months which preceded the time of his being disgraced. And although the language used by Capt. Hempstead at that time, was such as to wound the feelings of the libellant, still, nothing appears to have occurred sufficient to compel the libellant to quit the vessel, in self-protection. For any thing that appears in evidence, he might have remained on board the "Harmony," doing duty as a boatsteerer, up to the end of the cruise; and had he taken that course, instead of leaving her, it would then have been a question, whether or not he was entitled to wages as third mate, for the time subsequent to his being disgraced. His right to recover such wages would then have depended upon the question whether or not the master was justified, by the circumstances of the case, in disgracing him. But I think it is unnecessary for me to inquire whether the libellant was rightfully degraded or not, because the master and owners are ready to pay him his wages as third mate, for all the time he did duty as such; and because, when he ceased to be third mate, he voluntarily left the ship and her service, ceasing thenceforth to do duty on board the "Harmony" in any capacity whatever. Having left the ship of his own free will, without being obliged to leave her, he cannot now be entitled to claim wages which he never earned.

I will now proceed to consider the libellant's claim for damages, for the alleged assault and battery which took place on or about the 4th of July; and on this part of the case, while the evidence is voluminous, my remarks may be brief. I am satisfied beyond the shadow of a doubt, from a careful review of the whole testimony, that a gross and unprovoked assault was committed on Mr. Dodge by Mr. Heppington. While it cannot be denied on the part of the defense, that the respondent Heppington was the first aggressor in this matter, it is argued that he was justified in striking the libellant, by virtue of his superior station on board as chief mate, and for the purpose of maintaining his authority. Now, it is clear from the testimony, that the occurrence had nothing whatever to do with carrying on any part of the ship's duty, with the due and proper maintenance of the chief mate's authority, or with the suppression of insubordination; and to say that, when the third mate, being

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insolently and provokingly taunted by his fellow officer, the chief mate, with a want of skill, or something worse, replied, in the heat of the moment, in language of similar tenor, he might therefore be justifiably beat and pommelled into silence and submission by the chief mate, it seems to me, would be going far beyond the bounds of either law, or common sense. Such a doctrine savors too much of the tyranny of brute force to be regarded with ordinary complacency, and its general adoption would lead to perpetual strife and disorder. The fact that the assaulted party was an officer, and not merely a common sailor, tends to aggravate the offence ; although, in the latter case, I apprehend, it would have been equally unjustifiable, under the like circumstances. It would seem difficult to conceive a more aggravated case, than for one officer to beat, wound, and disgrace another officer, before the eyes of the whole ship's company.

The final question is, did Capt. Hempstead make himself a co-trespasser with Heppington by the share he took in the transaction ? In considering this point, we must bear in mind the fact that Hempstead was master, and this circumstance alone puts him in a very different position from that of Heppington. On reviewing the testimony touching this point, I am of opinion that Capt. Hempstead's primary motive for interfering was a desire to put a stop to the fighting of his two officers ; and, although the manner of his interference would seem to have been harsh towards the libellant, and manifested a strong degree of partiality in favor of Heppington, yet, it was necessary for the good of all concerned that he should by some means restore and enforce order ; and as the circumstances of the case do not appear to prove that the captain's conduct towards the libellant was clearly marked by unnecessary and unusual severity, or cruelty, I do not think he can be held legally responsible in damages.

I fully concur in many of the remarks made by the learned counsel for Heppington, on the impolicy of countenancing suits for damages, of a like nature with the present, when founded, as they sometimes are, on such trivial quarrels and disputes as are of frequent occurrence at sea ; but, no consideration of expediency can be permitted to weigh in a case like the present,

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where a complainant makes out a clear matter of wrong and injury ; for when that is satisfactorily shown, we must do justice, "let the axe fall where it may."

Let judgment be entered in favor of the libellant, against the respondent Heppington, for the sum of \$150 damages ; and let the costs be equally divided between these two parties.

C. C. Harris, Esq., for libellant.

J. P. Griswold, Esq., for Hempstead.

A. Campbell, Esq., for Heppington.

SUPREME COURT—APRIL TERM—1857.

E. R. COFFIN *vs.* THOMAS SPENCER.

The rule, in assessing damages for assault and battery, was stated by the Court to the jury in the charge, to be a just compensation, based upon the degree of bodily injury or suffering endured by the plaintiff, amount of physician's bill, loss of time and mental suffering, if any ; and if it appeared that the defendant had been actuated by malice, or committed the assault without provocation, then exemplary or punitive damages might also be awarded.

The pecuniary ability of the defendant furnished no criterion by which to assess damages, where no appreciable injury had been shown, still the law would imply some injury and give a right to recover nominal damages.

Associate Justices ROBERTSON and II on the Bench.

This was an action brought to recover damages, laid at \$4,000, for an assault and battery committed upon the plaintiff by the defendant, at the Merchants' Exchange, in February last.

It appeared in evidence, in substance, that the defendant and another person were playing billiards at the Merchants' Exchange, when the plaintiff entered and made use of some rude and offensive language, directed particularly at the defendant, who dropped his cue and walked up to the plaintiff in a somewhat menacing manner, putting his hands on each side of the plaintiff's neck, seizing him by the collar and saying the plaintiff had previously applied offensive language to him, and had not some ladies been present he would have flogged him for it, and that plaintiff must cease using offensive

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language to him, as he would not put up with it. At that moment plaintiff dropped on the floor, injuring one of his knees severely. Defendant and another person raised him up and placed him on a seat, and, as he appeared faint and suffering from fright, they gave him some brandy which revived him, when he said he was sorry if any language he had used to the defendant, at any time, had offended him, as he meant no insult to the defendant. In a quarter of an hour afterwards the plaintiff walked to the street and was assisted into his wagon, and his native boy drove him home. He took to his bed, and sent for a physician, who testified that he found him in a dangerous state, incoherent in his speech, and his pulse very low, as if he had recently received a severe shock. He also suffered much pain in his knee, and was unable to attend to his business for a fortnight, during the first half of which he was confined to his house. The physician testified also that the plaintiff is a man of rather feeble constitution, and whose nervous system was more easily shocked than that of a robust person. It also appeared that plaintiff had spent the two preceding evenings at Booth's Dancing Saloon, where he had drank to excess, from which the counsel for the defense argued that, at the time the defendant laid hold of him, he fell on the floor, not from any violence used by the defendant, but from the weak state of his nervous system, produced by previous dissipation, which rendered him incapable of sustaining any sudden shock.

Counsel having summed up on both sides, Judge ROBERTSON charged the jury in substance as follows :

GENTLEMEN OF THE JURY : This is an action brought to recover civil damages from the defendant, for an assault and battery, alleged to have been committed by him upon the plaintiff. This is a suit of a nature which is, happily, of rare occurrence in our peaceable community. It is a suit of that description which, when reached upon the calendar, it is gratifying, both to the Court and to the jury, to hear has been settled out of Court, so far as the civil damages are concerned, through the intervention of the mutual friends of the parties. But when the party complainant prefers to that mode of settlement an appeal to the Court and a jury of the country for

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redress, it then becomes the duty of the jury to adjudicate upon his claim, taking care that while they afford an injured party a fair amount of reparation, they afford no encouragement for the institution of such suits, as money-making speculations. The occurrence which has given rise to the present action, occupied so brief a space of time, was so simple in its nature, and the testimony of the several witnesses who saw it so clear, that I deem it unnecessary to recapitulate their testimony in your hearing. As honest witnesses generally do, in relating the same occurrence, they differ slightly as to minute details, for every man sees with his own eyes, and relates what he has seen in his own way ; but beyond any discrepancy which might fairly arise from these causes, the witnesses on both sides show an unusual degree of accordance in their statements. I shall, therefore, confine myself to the statement of what I conceive to be the rule by which you ought to be guided in measuring the pecuniary redress to which you may think the plaintiff entitled. There has been a diversity among the English and American authorities upon this subject, and between the rule as laid down by different Courts, for the guidance of juries. But the rule as almost universally adopted in our days, may, I think, be stated thus: In ordinary cases, where it does not appear that the defendant was actuated by malicious motives, or by a willful intent to do a severe bodily injury to the plaintiff, the jury is to be guided by the rule of giving to the plaintiff a just compensation for the injury he has sustained. In aggravated cases, when it appears that the defendant was actuated by malicious motives, as, for instance, when a violent assault and battery has been committed without any apparent provocation, or upon slight and inadequate provocation ; when the defendant has used dangerous weapons ; or when he has accompanied the act with such expressions as displayed a malicious purpose, and not merely a temporary excitement or irritation of passion from provocation, in such cases juries go beyond the rule of a just compensation for the injury sustained by the plaintiff, and very justly too, in my opinion, award against the defendant what are called vindictive damages, punitive damages, or, as we say, smart money. In such cases they give these extra damages, as a punishment to

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the plaintiff, and, for the sake of example, to deter others from committing the like offense.

In the present case, it is clearly proven, and admitted by the defense, that an assault was committed, and even if the plaintiff had failed to prove that he had suffered any appreciable injury, still the law would imply some injury and give him a right to recover nominal damages. The question with you, therefore, is not so much whether the plaintiff is entitled to *any* damages, as it is how much damages is he fairly entitled to receive? In ascertaining this, unless you are satisfied that the defendant was actuated by malicious motives,—by a willful intent to do a serious bodily injury to the plaintiff, you ought to be guided by the rule of affording to the plaintiff a just compensation for the injury he sustained. In measuring the injury done to the plaintiff, the first thing to be considered is the bodily suffering he may have endured, but this is not all, for there is his physician's bill of between \$40 and \$50, and the loss of his time during the two weeks he was incapacitated for business, and his mental suffering, if any. All these ought to be considered so far as they are fairly attributable to the assault. But, while you measure the plaintiff's injuries in this way, you ought, on the other hand, to consider the provocation which, it is said, he offered to the defendant, if you believe that such provocation was the immediate cause of the assault. Such provocation, while it affords no justification for the assault and battery, should be fairly weighed by you in mitigation of the damages, which you might otherwise think the defendant ought to pay, because, if the plaintiff rashly provoked the defendant, and caused the assault, the plaintiff himself is in part to blame for the consequences which followed, and the whole blame does not rest on the defendant. It may scarcely be necessary for me to advert to a point suggested by the counsel for the defense, that you are not to be guided in the least, in assessing damages against the defendant, by his ability to pay. This is obvious. It is of no consequence in this case whether the defendant be a wealthy man, or a poor man. You cannot measure the extent of the complainant's injuries by the depth of the defendant's pocket. Such a mode of proceeding would be absurd. With these remarks, gentlemen, I

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leave the case in your hands, confident that you will deal justly and impartially with these parties, and award the plaintiff such an amount of damages, and no more, as you may think, under all the circumstances of the case, he is fairly entitled to receive, as between man and man.

The jury, after a brief absence, returned a verdict of \$54 20, damages, in favor of the plaintiff.

J. Montgomery, Esq., for plaintiff.

J. W. Marsh and P. C. Ducorron, Esqs., for defendant.

IN RE ALEX. CAMPBELL.

An attorney and counsellor at law is admitted to practice during good behavior.

It is not necessary to constitute contempt that the act should be done in open Court.

Anything done intentionally to insult the Court, in the exercise of its legal powers, is a contempt, which may be punished summarily.

Publications libelling Superior Courts may be punished as contempt.

ALLEN, C. J.

This is a motion to vacate an order made by the full Court, on the 30th day of March last, to strike the name of Alexander Campbell from the roll of Attorneys of this Court, and to prohibit him from further practice, for contempt of Court.

If this was a matter between other parties than the Court and an attorney, who is an officer of the Court, our opinion would be that we should have no power to review or set aside the former order. We could only rectify or amend what appeared clearly a mistake or clerical error. If the right was asserted to control the proceedings of any other Court of Record, it could not be entertained ; for when a court commits a party for contempt, their adjudication is a conviction, and the commitment in consequence is execution. And so the law has been settled. (3 Wilson, 188 ; 5 Curtiss, 211.)

To regard the decisions of the Supreme Court as final is a constitutional principle ; but as no private party has any imme-

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diate interest in the result of this motion, it being a matter purely between the attorney who makes the motion and the Court, we have thought it the exercise of a sound discretion to entertain it. The Court felt a strong desire to hear the attorney, hoping that he would put himself *rectus in curia*.

It appears that Judge Robertson, at the time superintending member of the Court, received a communication from one of the departments of the Government which satisfied him that Louis Franconi was a Swiss citizen, and as such not entitled to be tried by a jury nominated by the Consul of France, which privilege had been claimed for him by his counsel, Mr. Campbell, and conceded by the Clerk with the sanction of the Court, under the belief that Franconi was a French subject. Judge Robertson seeing reason to suspect that some misrepresentation or mistake had been made in regard to Franconi's nationality, so that he would obtain a privilege to which he was not entitled, and the case having led to a diplomatic correspondence with the representative of France, considered it his duty to ascertain, on behalf of the Court, a true statement of the case, and with that view addressed a note to Mr. Campbell, the Attorney of Record in the case.

The case was still pending, and as the April Term was approaching, it was necessary to have the preliminary question as to the jury fully set at rest before the case came on for trial, both in justice to the accused and to the prosecution. It was doubtless the duty of the Court to have full information of the matter.

Such are the circumstances under which the letter of Judge Robertson was written on the 16th of March. Mr. Campbell regarded the letter of Judge Robertson as not of a judicial character, but private and offensive, and replied to it in terms which the Court regarded as offensive and insulting, and subversive of all public respect and consideration if its officers were permitted to assume over them a tone of defiance and insult. That they, at a special session, declared that "he (Judge Robertson) in writing that letter was in the discharge of his official duty as a member of this Court, and that he was entitled to receive a courteous reply thereto, which he had not done, but on the contrary the letter addressed to him by Mr.

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Campbell in reply was of a character grossly insulting, and plainly calculated to destroy the respect due to the Court. And therefore the Court did order that the name of Alexander Campbell be stricken from the roll of practitioners of this Court, and that he be strictly prohibited from this day forth from practising in said Court as an attorney, counsellor, or solicitor thereof."

The first ground on which we are asked to vacate the order is, that it was made at a special session of the Court, without previous notice to Mr. Campbell, and without his having had an opportunity of being heard in his defense. The practise of the courts has always been according to the requirement of each case. When complaints have been made against attorneys for malpractice by third parties, as a matter of course a rule would be made for the attorney to show cause; but when the whole case had transpired between the Court and the attorney, as for example when a contempt was incurred in open court, and when there was no controversy about the facts, and of course no occasion for any additional inquiry, a rule to show cause has not been regarded imperative or necessary.

That the Court acted in the strict legal rule, we refer to 3 Wilson, 14 East, 1. For contemptuous words spoken of the court attachment goes without a rule to show cause. (1 Salkeld, 84; 2 Burrow's R., 654, Charlton's case, Harrison's Digest, 1558.) Where the contempt is by abusive words, on the process of the Court, attachment goes without a hearing. (2 Comyn's Digest, 221.) If a man does a thing which deserves his being struck off the roll, it may be examined and determined in a summary way.

The courts of the United States are authorized by law to punish for contempt in a summary way, notwithstanding the provision in the Constitution of the United States directing that all crimes shall be tried by jury. The provision relates to such crimes only as by law and custom have before been tried by jury. (Hollingsworth *vs.* Duane, Wallace, 77, 106.) Chief Justice Story, in the case of ————, 2 Curtiss, 447, says: "To fine for contempt, imprison for contumacy, enforce the observance of order, etc., are powers which can not be dispensed with in a court, because they are necessary to the exercise of all others."

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In a recent case in the Superior Court in Suffolk County, Massachusetts, the court say that it is by no means necessary that the act claimed to constitute a contempt should be done in the presence of the court or while it is in session. "Any thing wilfully or designedly done for the purpose of insulting and degrading the court in the exercise of its legal powers, or to hinder, impede or prevent its proper, legitimate action in the discharge of its duties, is a contempt which may be punished summarily, without resorting to the ordinary and usual modes provided for the trial and punishment of crimes."

It is perfectly clear as to the courts at Westminster that contempts may not only be in the face of the court, but they may be committed out of the court. Publications libelling superior courts may be punished as contempts. (4 Barn. & Ald. Rep., 233.) Without this power it might be impossible for courts to proceed in the discharge of their duties.

In the case before us, according to the principle of the foregoing, the letter written by Mr. Campbell was the same in effect as if he had used the same insulting language in open court. Both letters were before the Court, and they constituted the whole case, and there seemed to be no necessity for any examination, any more than there would have been had the contempt been committed in the face of the Court.

The Court deemed it, if not their duty, at least within their discretion, to hear him, and he has offered all the objections he deemed proper against the former order. The Court are not aware that any new light has been shed on the history of the case. The facts of the case were as clearly before the Court when they issued the order as now.

It is not claimed that Mr. Campbell was desirous of submitting or tendering an apology to the Court, had an opportunity been afforded him of so doing. And now, when the Court have explicitly declared that the letter of Judge Robertson was written in a judicial character, and in clear discharge of his duty, still Mr. Campbell persists in regarding it as a private letter, and that he had a right to reply in terms of insult and defiance. What injury then has he suffered by not having been cited to appear in the first instance? for with this subsequent avowal of the Court, he has not thought proper even to withdraw the offensive portions of his own letter.

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Mr. Campbell contends that in dismissing him from the Bar for contempt, the Court exceeded its powers, because, he argues, that at common law the punishment for contempt was by fine and imprisonment, and the power of the Court did not extend to striking an attorney from the roll; and further, that the power of this Court to punish for contempt is limited and defined by Statute of 1850. (Penal Code, p. 69, Sec. 18.)

It is further contended that "it makes no difference that the accused is a lawyer and an officer of the Court."

The powers of an attorney as an officer of the Court are very extensive. He may waive objections to evidence, make admissions in pleading, or by parol, enter nonsuit and default, and make any disposition of the suit, and any admission of facts that the party himself could make. (2 N. H. Rep., 520.) The Court is of opinion that there is a material distinction between those who are, and those who are not, officers of the Court, and that this distinction has always been sustained. The powers and privileges of an attorney are very great in court, and the common law doctrine is that the power to punish for contempt is incident to and necessary for their very existence. The only question is not upon the existence of the power, but whether the facts established call for its exercise. If the power did not extend to striking from the roll, the Court would not have full power for its protection from that kind of annoyance, which would not only bring it into disrepute, but would impede its business and destroy its usefulness.

In 5 Barn. and Ald. Reports, 825, Abbott, Chief Justice, says: "Upon the facts reported to us by the Master, we are of opinion that this is not a case within the act of Parliament, but at the same time a case of most improper practice. If a bailiff be allowed to obtain writs in the manner stated in this report, the client will be wholly deprived of that attention he ought to receive from the attorney; and although this case be not within the statute, still the court, in virtue of its general jurisdiction over attorneys, has the power of restraining this practice; but as this is the first time that such a matter has been presented to this court, we do not think it right to order the attorney to be stricken off the roll in this instance."

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In the case, *ex parte* Tillingham, 4 Peters, 109, Chief Justice Marshall recognizes the power and authority of the Court to strike an attorney from the roll for contempt.

The Court, in support of the doctrine of the power at common law of courts of superior jurisdiction to strike an attorney from the roll for contempt, as well as that he was not a fit and proper member of a profession, which should stand free from all suspicion, cite Campbell, 829; 8 Adolphus & Ellis, 133; 4 Peters, 108; 7 Cranch, 32; 5 Barn. & Ald., 218; 5 ib. 824.

In Foster's Rep., 4 vol., 158, the Court say: "We have no doubt that although applicants for admission to practice on the ground of good moral character, are to be admitted by the superior court, yet they may be removed from office, or suspended from practice in the common pleas, by the court, upon good charge shown. Such a power is necessarily inherent in every court, in order to enable it to discharge its duties, as much so as the power to preserve order." (Foster's Rep., 156.)

In a recent case in England, when an attorney had been convicted of a misdemeanor, but judgment was reversed for insufficiency of indictment, Lord C. J. Denman says: "The present proceeding, as was laid down in *ex parte* Braundall, 2 Camp., 829, is not a punishment for a legal crime, but an exercise of the discretion of the court upon the question, 'whether a man whom they have formerly admitted is a proper person to be continued on the roll or not.' We think that the indictment and the verdict must be valid to the extent of preventing the attorney from having our sanction to practice." (Adolph. & Ellis Rep., N. 5, vol. 8, 133.)

Furthermore, any person receiving a license to practice as an attorney and counsellor of this Court, takes it with the express condition that he is admitted to practice during good behavior, and it is so expressed in the license. (Vol. 2, Statute Laws, p. 8, Sec. 12.) This trust is given to the Court for the public benefit, as attorneys unworthy of their profession contribute very much to the litigation of a community, and all improper practices. And there are occasionally cases when a withdrawal of a license is a duty on the part of the Court. Fortunately it is very rare. An apprehension has been expressed lest this power should be abused. The tendency of

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the times is to relax the severity of the former discipline, and to exercise the power over contempts with extreme moderation. Chancellor Kent says that the power to punish for contempt is given to the courts only for their preservation, in order to enable them to repel insults, to protect suitors, to support their process, and to be an asylum from violence and oppression.

It is also contended by Mr. Campbell, that the letter of Judge Robertson and his reply were not papers of a judicial character. The Court declare that the letter was judicial, written in relation to a case pending, and in which Mr. Campbell was the attorney of record. He is an experienced and able lawyer, and knows perfectly well the duties and obligations of an officer of the Court. Had he reasonable grounds to regard the letter as private? It was written for explanation in relation to a judicial matter pending, and in relation to which a diplomatic correspondence had already taken place. It could be regarded in no sense as private; if he entertained doubts about it, it was clearly his duty, as an officer of the Court, to have made inquiry of the Court in relation to its purport and meaning. I should regard an insult by the Court to an attorney, as an evidence of entire want of all proper appreciation of the relation existing between the Court and its officers, and a gross violation of public duty, and our view is that Mr. Campbell had no just grounds to regard the letter as a private one. The Court regarded Judge Robertson, in writing the letter, as acting in a judicial capacity, and therefore, of course they consider the reply as addressed to them. Such being the case, could the Court do otherwise than regard the letter of Judge Campbell as a gross contempt, as he expressly declared in his argument on the motion to vacate the order, that he had replied to an insulting letter in terms of indignation and defiance; "that he had met insult with insult."

It is impossible for the Court to discharge its duties usefully, or have the public respect and consideration, if its officers are permitted to assume towards them a tone of defiance and insult. Mr. Campbell does not assert that if he was mistaken in the character of the letter of the Associate Justice, that he would withdraw the offensive portion of his own letter, or express a regret or apology for a communication avowedly insulting.

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In the history of Courts, there has been fortunately very few cases of this character. The case of Charlton is somewhat analagous, and was summarily punished, and is cited in Harrison's Digest, vol. 1, p. 1558, as follows :

"A barrister, who was also a member of Parliament, appeared before a Master as counsel in support of a petition presented by himself and others, and he afterwards addressed a letter to the Master, which was expressed in threatening terms, and the tendency of which was to induce the Master to alter the opinion the Master was supposed to have formed upon the case ; and he subsequently wrote a letter to the Lord Chancellor, in which he avowed the authorship of the letter to the Master. The Lord Chancellor committed him to the Fleet during pleasure."

Striking an attorney off the roll, is not always understood to be a perpetual disability, for the Court has in some instances permitted him to be restored, considering the punishment in the light of a suspension only. This is the view taken in Tidd's Practice.

In order to sustain the present motion, a reasonable ground of doubt as to the legality of the order should be presented to the Court. It was a question within their jurisdiction, and a punishment given within their legal power and discretion, according to their view of the contempt imposed upon them, and therefore the Court decline to vacate the order.

The motion is denied.

SUPREME COURT—IN ADMIRALTY.

R. COADY *et als.* vs. 1,200 BARRELS OIL, 15,000 POUNDS BONE, ETC., ETC.

After essential services have been rendered to a vessel, yet the subsequent misconduct of the salvor may not only diminish the amount of his reward, but his entire claim may be forfeited.

Persons attached to a ship, which has been wrecked, may claim as salvors, when their services exceed the proper duty of seamen, and when their connection with the ship has been *de facto*, or, by operation of law, dissolved.

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No fixed rule for the ascertainment of the rate of Salvage. The circumstances entitled to most consideration are, the value of the property saved, the extent of the service and the degree of merit and gallantry in accomplishing the enterprise.

Except in extraordinary cases, a moiety of the property saved is the highest compensation, which Courts of Admiralty are in the habit of awarding.

ALLEN, C. J.

This was a libel for salvage, filed by Richard Coady and others, the owners of the whaling bark "Italy," for themselves and the officers and crew of said bark, for alleged services in saving from the ship "Natchez," in the Summer of 1857, lying a wreck in Potter's Bay, in the Ochotsk Sea, and abandoned by her master and crew, a large amount of property, particularly enumerated in said libel; also, for services rendered by the bark "Harmony" to the ship "Natchez," in placing said wrecked ship in a comparatively safe position in Potter's Bay, in the Ochotsk Sea, in the Autumn of 1856, and to her master, officers and crew, by furnishing them passage to this port.

And Isaac Wrisley, third officer, and John M. Lockman, as fourth officer of said ship "Natchez," intervening for themselves and their companions, Charles E. Ripney, boatsteerer, and Isaac Bunce, carpenter, but now deceased, and who, they believe, has one brother and two sisters in New York city, for their interests in said property libelled, for services rendered in the preservation of the property aforesaid, while in Potter's Bay, from the time of its wreck till possession was taken of it in Potter's Bay by the mate of the "Italy," in July last past.

Also, of George W. Willfong, second officer of the bark "Harmony," intervening for his interest in said property, libelled for services rendered in the preservation of the property aforesaid while in Potter's Bay.

It is alleged in the libel that all the rights and claims of salvage which may be adjudged as belonging to the owners of the bark "Harmony," shall be awarded to the libellants in pursuance of an agreement made by Richard Coady, the owner of the "Harmony," and one of the libellants. It is alleged, also, and not denied, that the owners of the "Italy" have entered into a contract with the officers and crew of said ship, in which they agree to pay to them, according to the stipula-

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tions of the shipping articles, a certain lay on all the oil, bone, etc., which may be awarded them.

Messrs. Bates, Harris and Griswold for the libellants.

Messrs. Davis and Austin for the intervenients Lockman and others.

Mr. Hinton for the intervenient Willfong, second officer of the "Harmony."

Mr. Montgomery for the claimants.

This suit has occupied nine days in its investigation, and has been most elaborately and ably argued by the learned counsel engaged for the several parties.

The testimony introduced is substantially as follows, viz :

The ship "Natchez," of New Bedford, sailed from the Sandwich Islands in March, 1856, and proceeded to the Ochotsk Sea, where she continued in the whaling service until October, 1856. That on preparing to return to the Islands, at the end of the season, she encountered a gale of wind, and put into Potter's Bay for shelter, let go both anchors, but they could not hold the ship, and the masts were then cut away to save the lives and property, the vessel being in about four fathoms, and striking at low water at both ends, with the wind blowing on shore, then in about 56° 30' N. latitude.

Potter's Bay is about thirty miles deep, and the "Natchez" was about three miles up the bay at the time she struck, on the west side. If the spars had not been cut away, the ship would have been in danger of being lost on the night of the disaster, and, if left as she was then through the Winter, she was in danger of going to pieces. The next morning the "Harmony" was discovered, and Capt. Bellows went on board of her, there being no vessel in the vicinity excepting her. He stated that he had lost his ship, the "Natchez," and wanted Capt. Hempstead to take him and his crew to the Islands, which Capt. Hempstead refused, unless Capt. Bellows could furnish him with sufficient provisions, being already short.

Capt. Hempstead returned in the boat with Capt. Bellows on board the "Natchez," and afterwards went to the "Harmony," and proceeded up the bay, about fourteen miles, and anchored. The anchors of the "Natchez" were then weighed, and the vessel kedged out with an anchor got from the "Harmony,"

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until she was in the middle of the bay, close to the "Harmony." The "Natchez" was then towed up, and one of the "Harmony's" boats was engaged in assisting. The "Harmony" also sent her boats on board the "Natchez" for provisions, to supply the crew of the "Natchez" on board the "Harmony," on their way to these Islands, and also for the sick men.

The "Natchez" came to anchor about ten miles from where the "Harmony" lay, on the northwest side of the bay, and the next morning the "Natchez" was run ashore on the flat in the bend of the land, and hove as far on as she could be at two successive high tides. The bottom of the "Natchez" was in good condition, and no leak at the time of leaving her, except about fifteen feet of her false keel gone forward and ten aft. The mate and second officer proposed to the captain to rig jnymasts, the second or third day after the "Harmony" came to their assistance, which was in the morning after the masts were cut away. At the time of the proposition to rig jury-masts, the "Harmony" had done nothing except lending a kedge anchor, because the wind was so strong it was feared the "Natchez" would go ashore if she was moved. It would have taken a fortnight or three weeks to have rigged jury-masts.

It was a matter of importance to get the anchor from the "Harmony." The "Harmony" would stow some one thousand eight hundred to two thousand barrels of oil, and bone in proportion, and could have taken nearly the whole of the oil and bone of the "Natchez," and brought it to Honolulu, in addition to what she had on board of her own; the weather at the time being such that it might have been transhipped as well as the provisions, and could have been done in four days by the two crews. During the towing, sometimes one and sometimes two of the "Harmony's" boats were employed. The "Natchez" had five boats of her own, which, with her full complement of hands, would have been able to tow the ship.

Capt. Bellows then ordered all the crew of the "Natchez" on board the "Harmony," and they all went except Lockman, Wrisley, Ripney and Bunce, who pulled on shore. Previous to leaving the ship, the mate asked Capt. Bellows what he was going to do with the property, and he said he had sold it to

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Capt. Hempstead, and that he should abandon the ship, the mate protesting against it. The mate wanted to go ashore, but Capt. Bellows ordered him into the boat, saying that he would take pretty good care that he did not. It was in evidence that he had sold the ship to Capt. Hempstead for \$100 or \$150, and that the persons present at the sale were the two masters and Lockman, Wrisley and Bunce.

After the sale of the vessel, the men were getting their things out, and Capt. Hempstead asked Lockman what he would take to stop by the wreck ; and it was ultimately agreed that Wrisley, Bunce, Ripney and Lockman should stay by the vessel upon receiving each one-twentieth part of all there was belonging to the ship and cargo saved, after which Capt. Bellows, standing on the gangway, said : "I abandon the ship to the winds and the waves." This was on the 15th October, nine days after she struck. All persons attached to the "Natchez" then went on board the "Harmony," except the four men that went ashore.

The crew of the "Natchez" were ten days on board the "Harmony," up to the time of leaving, and forty odd days in coming to Honolulu, where she arrived on the 1st or 2d of December, 1856.

The "Harmony" was more liable to danger by remaining in the bay at that season, than she would have been in ordinary whaling weather.

There were one thousand two hundred barrels of oil on board at the time the "Natchez" struck, and eighteen thousand pounds of bone.

Lockman, Wrisley, Bunce and Ripney, after going on shore, returned on board the same night, where they remained until the last of November, when, in consequence of a heavy northeaster, which afterwards hauled to the northwest, they drifted off from three to five miles, the bay being full of ice at the time, and at the same time parting her starboard chain and the anchor was lost. After this she continued to drift for three days, until the larboard anchor, swinging backwards and forwards against her bow, chafed the ring stopper off, and the chain ran out and held her with the larboard anchor. Not deeming it safe to remain longer on board, they made several

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attempts to get on shore, but were unsuccessful, being at the time from three to five miles off.

At length they went ashore as far as they could in their boat, and then left her and went on the ice, and proceeded to their house on shore.

The vessel still continued drifting for ten to fifteen days, until the ice closed up solid, she dragging her larboard anchor.

In January sometime she parted her larboard anchor, they being all on shore at the time, and the vessel being in view of their house. It was not considered advisable to shackle the chain at that time, because if they had done so, it would, in all probability, have been frozen round by the ice and parted again.

That Bunce, Wrisley and Lockman shackled the chain in the month of April, Ripney being sick at the time.

That Bunce, one of the party, died on the 26th June, after having been sick with fever twenty days.

During the Winter, a Cossack, in company with an Indian, crossed the head of the bay, from Ayan to Nicolaessky, with the mail. In ten or fifteen days they returned with a letter from the Governor of Nicolaessky, of which the following is a copy :

“TOWN OF NICOLAESSKY, River Amoor, Dec. 22-3d.

“The Governor of this place having heard that a whaleship has been cast away near the Ochotsk Sea, and that there are a portion of the crew yet alive, sends by these Indians warm clothing and food ; and if you are disposed, you can follow them to this settlement, about one hundred and fifty miles from where you are. Here you will be cared for.

N. A. KHITROVO,

“Secretary of Russian Imperial Government.”

Addressed “To any of the crew of a whaler cast away in Shantar Bay.”

Upon receipt of the foregoing letter, Lockman proceeded in company with the Cossack to Nicolaessky, where he saw the Russian Governor, who asked him why he was in Shantar Bay, and what he was there for ; and he replied that he was wrecked there, and that he was left by the captain to take care of the property. Upon which the Governor asked him if the vessel

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was fast; and he replied that it was no use making her fast until the ice was gone. The Governor then said the Cossack had found the ship abandoned and no one on board, and that by rights she belonged to the Russian Government; but that as we had stopped there, he would not take it, but would protect us. The Governor then instructed the Cossack to tell the natives not to touch us or go near the ship; but he said that anything they might have already taken, it would be impossible to get back. After that they met with no interference from the natives.

The "Italy" sailed from Honolulu in March, 1857, and returned to Honolulu the 2d or 3d of November, 1857. She carried more than the ordinary number of men required in the whaling service, in order to save the property of the "Natchez."

The mate of the "Italy" left her at Mercury Head on the 2d July, and proceeded to Potter's Head, and having landed on the sandspit and proceeded to where some smoke was seen, he discovered Lockman, Wrisley and Ripney, and the next day they all proceeded on board the "Natchez," which was found four miles from where she had been left in the previous season, full of water at high tide, and decks partly covered with water, wood-ends partly started, plank and sheathing gone, and in bad condition—a wreck. She could not have been moved with safety to the property on board, nor could she have been put afloat after the removal of the property. She was made fast to one anchor and chain and lying aground. She was moored by being on the ground.

Capt. Babcock instructed the mate to pay the men, if they were found in possession of the vessel, whatever their agreement was with Capt. Hempstead or Capt. Bellows. Capt. Babcock afterwards agreed that Lockman should have \$1,000 upon his arrival in Honolulu, but the amount has never been paid. Mr. Lockman applied to Mr. Coady for it on his arrival in Honolulu, but he refused to pay more than \$500, which he, Lockman, declined accepting.

These men had a house on shore and another near the mouth of the Bay, where they could see ships coming in. The "Italy" was six or seven miles from the "Natchez," where she anchored. She arrived there on the 20th July.

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The "Natchez" being gurried all over with the oil inside, it made it very difficult to work down between decks. It was difficult to save the property on account of having only one hour, or so, tide. Kanakas had to dive for the bone into the lower hold; the oil had to be towed during the night as well as the day, and the men got but little sleep in consequence; most of their victuals were cooked on board of the "Italy" and sent to the "Natchez." The wreck would have been very unsafe during the last ten days of the wrecking in case of a blow. Nothing else could have been saved by remaining longer by the wreck. It was supposed by the mate that 6,000 or 7,000 pounds of bone was still on board the wreck when they left her. While the mate was on board the "Natchez" there were whales seen every day from the time of the "Italy's" arrival, and while there, previous to the "Italy's" arrival at her anchorage, he, with Mr. Ripney, got a whale; it was about the 9th of July.

Several shipmasters testified that the weather was generally good in Potter's Bay in the months of July and August.

Capt. Green, of the "Sheffield," states that he was aware of the wreck of the "Natchez" being in Potter's Bay, and had had an idea at one time of wrecking her; but that Mr. Coady had told him that the "Italy" had been fitted out for that purpose, by order of the owners, and he then abandoned the idea.

The third officer of the "Italy," Mr. McClintock, testifies that during her voyage they took seven or eight whales, but did not catch any after the 16th August. That after leaving the "Natchez" they lowered frequently, but did not get any; and during the time the first officer was away looking for the "Natchez," they continued whaling as usual, but were unsuccessful.

The main force of the "Italy," from the 20th July until her departure down the Bay on the 16th August, was occupied in wrecking the "Natchez" and in their preparations for departure. Several ships visited the mouth and lower part of Potter's Bay during this season.

Mr. Durham, the clerk of R. Coady & Co., testified to the correspondence between Messrs. Coady & Co. and the owners; on the arrival of the "Harmony" at the port of Honolulu, that

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R. Coady & Co., the owners of a portion of the "Harmony," parties to the libel, addressed a note to Messrs. S. Thomas & Co., agents of the ship "Natchez," in which they give an account of the disaster; of the ability of the "Harmony" to have brought a great portion of the oil and bone to Honolulu, and that they intended to fit her out for a whaling cruise, with carpenters and crew sufficient, and all things necessary to bring the "Natchez" into port, if she would float; and they should expect reasonable salvage. They repudiate the sale from Bel-
lowes to Hempstead as illegal. The letter is very honorable to them, and the owners represent themselves highly gratified with the honorable course of conduct pursued by them. They referred Messrs. Coady & Co. to Mr. Waterman, their agent, whom they had directed to confer and co-operate with Messrs. Coady & Co. in the recovery of the ship and cargo. They, however, subsequently decided not to send the "Harmony," but, by the co-operation of the other libellants, fitted out the "Italy" for a whaling voyage, and for the purpose of wrecking the "Natchez," for she was regarded as better adapted to the purpose.

Mr. Durham further testified that the "Italy" sailed for \$15,668 02, including advances to the crew, etc., of \$2,273 44, and that she brought into port an amount of property from the "Natchez," which he valued at \$39,854 26, and that her own catchings are valued at \$12,000.

It was agreed by the counsel that the average catchings of the fleet during the last few years, had been about 825 barrels of oil, with the usual proportion of bone, which, by the same estimate, would be worth here \$26,400.

I propose to examine the several claims for salvage in the order in which the services were rendered; and the first were those of the "Harmony." The history of the whole proceedings by her master, and the amount of service rendered by this vessel, are fully detailed in the sketch I have given of the testimony.

It is a clear proposition of law, as well as of morals, that salvors may be curtailed, or even deprived altogether of their salvage remuneration through error, misconduct, or want of skill and capacity in the performance of a salvage service. In

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the case of the "Duke of Manchester," 2 W. Robs., 471, the court expressly declares that when essential services have been rendered to a vessel, the subsequent misconduct of the salvor may not only diminish the amount of his reward, but his entire claim may be forfeited. This doctrine was distinctly laid down by Lord Stowell in the case of the "Medina ;" and in the case of the "Neptune," 1 Rob., jr., 297, the court declined to give any salvage at all, the Trinity Masters having pronounced that the asserted salvors had been guilty of gross negligence, if not of willful carelessness, in allowing the anchor to be let go, and in keeping the course of the ship to the north, when she should have gone to the south.

The authorities fully sustain the principle of the forfeiture or dimution of salvage by misconduct. (See the "Joseph Harvey," 1 C. Rob., 306 ; the "Barefoot," 1 Law and Eq. Rep., 661 ; the "Glory," 2 Law and Eq. Rep., 551 ; the "Cape Packet," 3 W. Rob., 122.)

The case of the "Barefoot" presented these facts : That she was laden with lead and iron, sunk on Shipwash Sand, and was there left by the master and crew. Held, that the ship was not a derelict, that the authority of the owners and underwriters remained ; and the first finders, though they recovered part of the property, forfeited their claim to salvage, and became liable to the costs of a suit instituted by them as salvors, by reason of the subsequent misconduct towards and forcible resistance to the authority of the owners. (See for the authorities on this point—"Elizabeth and Jane," Wall, 38 ; the "Glasgow Packet," 2. W. Rob., 306 ; the "Dosseitie," 10 Jurist, 865 ; the "Duke of Manchester," Ib., 863 ; the "Neptune," 1 Rob., 297.)

The principle is well settled that salvage may be forfeited by aggravated misconduct on the part of the salvors, such as spoliation, smuggling, or gross neglect. (6 Wheaton, 152.) The "Belle Corunne's" claims for salvage were pronounced against for erroneous and improper conduct. (The "Dryden," 5 Eng. Ady. Rep., notes of cases, 116.)

A joint action of two sets of salvors, viz : The crew of the smack "A," the primary salvors, and the crews of six other smacks, for salvage in respect of services rendered to a foreign

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ship in getting her off the Long Sand, dismissed on the ground that the primary salvors, who had boarded the vessel prior to her striking on the Sand, had acted erroneously, and had by the means they adopted caused the vessel to get on the Sand. On a subsequent application to the Court on behalf of the other salvors, whose services had been rendered after the vessel had got on the Sand, and who had not in such services recognized the prior acts of the primary salvors, £200 was awarded to them, with costs, on a value of £7,500. Had the claims of the second salvors been founded in any degree on the original error of the first salvors, no services which they might have rendered afterwards, however meritorious, would have entitled them to derive a benefit from the error of misconduct of the first salvors. (Prichard's Adm. Dig., 375, § 133.)

The sale of the vessel to the master of the "Harmony" is regarded by the libellants as invalid—of which there can be no legal doubt, for the ship had been placed in a position which was regarded by them as comparatively safe; and, if so, there was a strong probability of saving the whole property, which was of great value. And for whom? Not for the owners of the "Natchez" certainly—otherwise there would have been no sale, but there would have been a faithful effort to have wrecked the "Natchez," and taken from her all the property which the "Harmony" could have brought to Honolulu. And it is admitted that it was the duty of the master of the "Harmony" to have done it.

The testimony of Mr. Dyer, the first officer of the "Natchez," and Mr. Willfong, the second officer of the "Harmony, that the vessel had ample capacity to have brought most of the oil and bone and other property on board, and that by the aid of both crews the transhipment could have been made in four days, or at farthest it would have taken them no more time than they occupied in placing the "Natchez" in her Winter berth.

Was there a collusion in the sale of the vessel and cargo for one hundred dollars? and was the vessel safely anchored for the Winter, and, as it were, laid aside for future use? If so, there was no service worthy of salvage compensation. In this case there would be an entire want of good faith and an honest purpose to save the property for the benefit of the owners.

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It has been argued by the libellants, that although the master ought to have perfected the salvage service at the time, and that he is not worthy of compensation, still the owners and crew should not suffer by the want of good faith, reasonable skill, and sound discretion of the master. The master has the entire authority in the government of his ship; confidence in his discretion, integrity, and qualities for his peculiar command are reposed in him, and the consequences for all these, or want of them, necessarily result to the owners who have employed him, and to the crew who serve under him. The neglect to take this property on board the "Harmony" was the fault of the master. That the owners are responsible for the conduct of the master is a general principle of law; and they are often liable for the wrong doings of the master—at any rate, in a case of salvage service, if there is any loss from the want of good faith, discretion and energy of the master of the salving ship, it certainly should not be imposed upon the innocent and absent owners of the property wrecked. Suppose the master of the "Harmony" had done nothing, and the officers and crew had earnestly solicited the master to perform this salvage service, it will not be contended that they should be rewarded for salvage service for their good intentions, on the ground that they were desirous of doing their duty, but the master prevented. So in this case, the service was not rendered at the time in which it was in the power of the libellants to perform, but they subjected the property to great hazard and loss by the delay. Had the cargo been removed from the "Natchez" at that time, and she had been anchored where she was, she would have, doubtless, remained there, and ultimately been taken to a port for repairs—at Ayan, perhaps—if not, to this port.

It has been likened to a case of embezzlement of some portion of the cargo by some of the salvors, where the forfeiture only follows the act of the individual, but does not apply to the ship's company. The authorities sustain no such analogy, neither does sound reason. Each person suffers for his own crime, but the owners and crew must take the consequences of a want of good faith and of good judgment of the master. Whoever undertakes to save property are responsible for the exer-

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cise of those good qualities, and to subject to unnecessary hazards, delays and loss, is a violation of duty as salvors, and the consequences must attach to all who are connected with the transaction, no matter whether they are principals or agents. To entitle men to salvage remuneration, they must do their duty in the best manner they are able under the circumstances. Has it been done in this case? It is admitted that it has not. This is only the common experience of men who suffer from inconsiderate or faithless agents.

Had a salvage service been faithfully done; had there been good judgment, and an honest purpose, the property would have been brought from the wreck in the Autumn of 1856 to this port, and probably the ship saved without very material injury to her hull, and a liberal salvage remuneration would have been awarded. As it is, the owners, officers and crew are not entitled to any. It is true that, in meritorious claims for salvage, courts always regard them with favor; but when there is an evident indication of a disposition to take advantage of the unfortunate, or to subject the property to hazard for ulterior and selfish purposes, it can not be too strongly rebuked.

The next question for the consideration of the Court is, are the seamen who were attached to the ship and remained by the wreck, till the necessary aid by the master and crew of the "Italy" was tendered, entitled to any compensation?

It is alleged by the counsel for the claimants, that they having been attached to the ship "Natchez," could not legally render a salvage service.

All the authorities sustain the doctrine, that persons having been attached to a ship which has been wrecked, may claim as salvors when their services exceed the proper duty of seamen, and when their connection with the ship in the capacity in which they shipped had been *de facto*, or by operation of law dissolved. (The "Two Catharines," 2 Mason, 219; the "Neptune," 1 Hagg. Ad., 227-237; Mason *vs.* "Blaireau," 2 Cranch Rep., 240; Hobart *vs.* "Drogan," 10 Pet. Rep., 108-122; Hand *vs.* schooner "Elvira," Gilpin's R., 60; the "City of Edinburgh," 2 Hagg. R., 333.)

In the case of Mason *vs.* "Blaireau," it appears that the ship was abandoned on the ocean by the master and crew, with the

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exception of one seaman, who was left on board either by accident or design, and who co-operated with others, by whom the ship was afterwards found, in bringing her into port; he was allowed by the Court to share in the salvage.

It is further contended that, as they, or a portion of them, were witnesses of the invalid or fraudulent sale, they are not entitled to any compensation. They positively swear that they knew nothing about the sale until called into the after cabin. They say they supposed that the masters of the ships knew how to do such business. After the sale by the master of the "Natchez" to the master of the "Harmony," the latter made a contract with these seamen to stay and guard the property during the winter, or until relief was sent them. It was a severe and somewhat dangerous undertaking to remain on that inhospitable coast during a winter. I see no reason to believe that they acted dishonestly. They certainly have conducted with energy and courage, and have done very material service to the wreck. What the result would have been if the chain had not been shackled before the ice broke up, is uncertain; still all will agree that the ship was much more liable to drift out of the Bay without the anchor than with it. The ship and her stores, and all else on board, were exposed to the natives; these intervenients were custodians. After the letter was received from the Governor of Nicolaesky, Mr. Lockman went to see him, and stated to him their condition and that of the property, and it will be seen that he then gave instructions to the Indians and all others to respect these men and the property under their charge. His generous conduct to these men reflects honor upon himself and his Government. It was an act of humanity which will be warmly appreciated by the people whose flag the ship bore. They were nearly nine months engaged in this service. It appears in evidence that the master of the "Italy" thought Mr. Lockman's services were worth \$1,000, and gave him an agreement to pay him that amount. Mr. Bunce died a short time before the arrival of the "Italy," in the month of June; his services were equally meritorious with the others, and his heirs are entitled to whatever may be awarded in consideration therefor. A contract made with a person without authority, as with the master of the "Har-

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mony," who claimed under an invalid title, has no binding force on the libellants or the claimants. The agreement with Capt. Babcock, so far as appears, was made understandingly ; but as it was not complied with, the interveners have appealed to the courts. I do not regard these agreements as fixing the rates of compensation, neither do they alter the nature of the service, as a salvage service ; it is still a salvage contract, and entitled to a salvage compensation.

The next question in order are the claims of the "Italy;" and in presenting his view of the measure of damage, the counsel very properly declares that each case stands on its own footing, and must be decided according to the peculiar circumstances attending it, refers to the following cases, viz : *Mason vs. "Blaireau,"* 2 Cranch, 240. This case was very carefully examined by Chief Justice Marshall, and he gave a very able opinion upon it. It appeared in evidence that the ship "Blaireau" came in collision with a Spanish seventy-four gun ship, was seriously injured, and was abandoned on the high seas by her officers and all her crew except one man, who was left either by accident or design on board. The next day she was boarded by the ship "Firm," bound on a voyage from Lisbon to Baltimore, of the actual burden of 500 tons, and of the value of \$10,000, with a cargo of salt of the value of \$4,000. Upon taking possession of the "Blaireau" she had about four feet of water in her hold, and could not have swam more than twelve hours longer. There was great risk and peril in taking charge of her. She was brought into the Chesapeake Bay after a navigation of nearly three thousand miles, by six persons who went on board of her from the "Firm," and the man who was found on board. Part of her cargo was taken out to lighten her forward, and put on board the "Firm," and part of it shifted aft. The "Blaireau" was navigated by the people of the "Firm," without boat or anchors. She was obliged to be pumped in fair weather by all hands, every two, three or four hours, half an hour at a time, and in blowing weather every hour, a quarter of an hour at a time. Her bow was secured by coverings of leather, copper and sheet lead, nailed on, and pitch and turpentine in large quantities poured down hot between the planks and the coverings. The labor of working the

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"Blaireau" by the men on board was great and severe, and they had frequently thought of abandoning her, but fortunately persevered. She was a slight built vessel, and constructed without knees, and was very weak. The forestay was gone, and the foremast was secured by passing a large rope through the hawse holes and securing it to the foremast-head. It was the opinion of several experienced sea captains that the bringing in the "Blaireau" was a service of great risk and peril, and nearly desperate, and such as they would not have undertaken. The "Blaireau" and her cargo produced net \$60,272 68, and the court awarded for the salvage service \$21,400. (The "Henry Ewbank," 1 Sumner, 413; Schooner "Emulous," *ib.*, 214; the "Reliance," 2 Hagg., 91; Sprague *vs.* 140 bbls. Flour, 2 Story, 195; 5, 6, Rob., 322; Abbot on Shipping, Notes, side page, 555.

The "Ewbank" was found derelict; she was freighted with cargo and rice, bound to London from Charleston, S. C.; she met with severe disaster and lost her rudder; she was abandoned on the 12th March in lat. $42^{\circ} 4'$ N., and in long. $53^{\circ} 50'$ W., by the master and crew, and at the time completely unmanageable; her cargo was shifting and she was waterlogged, and in imminent peril of foundering from the nature of her cargo and her further situation. On the first day of April she was discovered by bark "Hope," in lat. 40° , long. 54° , who concluded to undertake the enterprise of getting her into port. She was without rudder, and nine feet of water in her hold. A new rudder was constructed, but it did not answer the purpose, and the ship was steered by her sails; continual pumping was required. This state of things continued to May 1, when they fell in with the brig "Padang" of Boston, bound to New York. The crew of the "Ewbank" were in a state of great discouragement and exhaustion, and in want of provisions, and were entirely willing to give up the whole enterprise. After some negotiation with the master of the "Padang," it was concluded to make an attempt to fix a new rudder and to get the "Ewbank" into port. A new rudder was constructed, and hung in a very ingenious and skillful manner, and a new crew having been found, from the "Padang" and the "Ewbank," she proceeded on the voyage and arrived in Boston on

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the 3d day of June. The "Padang" remained by the "Ewbank" until the rudder was hung and arrangements made for the voyage, having had her in tow part of the time. Justice Story awarded in this case, to all the salvors, a moiety.

The "Emulous" was a schooner laden with mahogany, logwood, coffee and hides, on a homeward voyage from ——— to Boston—struck on a reef at Robinson's Hole, on Nashawn Island, in the Vineyard Sound, on the 8th of February, and was so much injured that she immediately filled with water; immediate assistance was rendered from the shore, and the cargo was landed; the vessel was hove off from the reef and left at anchor, but capsized during the night. With a good deal of exertion and perseverance, and some considerable risk, she was brought into the harbor of Edgartown.

The district court decreed to the libellants \$1,200; value of schooner and cargo being \$5,722 38. From this decree the claimants appealed to the circuit court, and Mr. Justice Story reduced the amount to \$850, which is a little more than one-seventh of the property saved. In his decision he adverts to the case of the "William Beckford," also cited by the counsel, and he says that the property was in great distress, and the circumstances more perilous than those of the present case, though somewhat resembling them. Lord Stowell decreed a salvage of £1,000 out of a property worth more than £17,000, as an ample remuneration. I am not sure that I should have arrived at a result so moderated and measured.

I will not give further detail of the authorities, for they conform to the same general principles as to the allowance of salvage. The counsel for the libellants having suggested that it was of great practical importance to the whaling fleet in the Pacific, that a very large salvage should be given, and as this was the first suit for salvage services ever tried in this Court, it would necessarily have great weight as a precedent. They further maintain that the Court is under no obligation to regard the rules and principles of the maritime law in other countries, for their application here would tend to error, as the circumstances of the navigation in this great ocean are so different from the Atlantic. It is true circumstances differ, but principles never. It has been truly said by an eminent jurist, that "a

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judge must have more than ordinary boldness, or confidence, or presumption, who will venture to cast himself adrift from all rules and laws upon the broad ocean of discretion, without taking counsel of the wisdom of his predecessors." With him I can truly say that I have not the slightest inclination to adventure upon such a course. The ships "Natchez," "Harmony" and "Italy" were under the American flag, and the owners of neither can very reasonably be dissatisfied if the principles and decisions of their own courts, so eminent for learning and experience, are applied to them. That this case is important as a precedent may be true, but it certainly does have very little weight if the Court, in its decision, will not regard the authorities of courts in the United States and in Europe, so eminent for learning and experience in cases of this sort, and especially when their own citizens are involved. The principles of the maritime law are very well settled on the general question of salvage. The anxious solicitude which the Court feels in suits in admiralty of this character, arises from the *enlarged discretion* they have in making their decisions. Each case has its peculiar history. The difference of facts in each case makes the difference in result. Some cases are of imminent peril to the lives of the salvors, as well as to their ship; others are not dangerous, but laborious. The property saved is sometimes very great, and sometimes very small.

It is argued that unless very large remuneration is given, wrecked property will be left to perish. This may be, and if those who are engaged in the whale fisheries can obtain more of value from the sea than they could from a wreck, with the same labor and hazard, and in the same time, the public lose nothing; or if a Court of Admiralty decree to them the extraordinary amount indicated by the counsel, it is hardly worth the time and expense for the unfortunate owners to present their case to the Court. It would be virtually a decree of the whole property, in all this class of cases to the salvors, and hence it would be a matter of no consequence to the owners whether their property was rescued or not.

In cases where mariners are in peril and distress on the wreck, and the salvors rescue them, their gallantry will always enhance the salvage compensation. Fortunately this case has no such

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element. It was a creditable commercial enterprise, combining the double purpose of a whaling voyage and wrecking the "Natchez." The ship "Italy" was employed in her legitimate business with all her force, till the 2d day of July, when the 1st officer and a boat's crew left for Potter's Bay to ascertain the condition of the wrecked property, and during the first twenty days of July she was employed in whaling, as opportunity offered. There were other ships at the mouth of the bay, but none went so far up as she did, and she would not have gone up so far for that object alone. This deviation occupied time which might have been more profitably spent, so far as whaling was concerned. Their whole force was occupied in wrecking and in preparations for departure, from that date till the 16th of August, when she sailed from the bay and cruised the balance of the season in her regular whaling business. It was in evidence that August and September were favorable for the business of whaling. It is impossible to have any fixed rules for the ascertainment of the rate of salvage. Each case has its own peculiar circumstances and considerations. Mr. Justice Story says that "the subject is necessarily one in which the reward must depend upon a just estimate of all the circumstances of each particular case." The circumstances entitled to most consideration are, the value of the property saved, the extent of labor and services, and the degree of merit and gallantry in accomplishing the enterprise. The latter, in an especial manner, is looked to by the Court with uncommon favor. Lord Stowell says that the fatigue, the anxiety, the determination to encounter danger, if necessary, the spirit of adventure, the skill and dexterity, which are acquired by the exercise of that spirit, all require to be taken into consideration. What enhances the pretensions of salvors most is actual danger which they have incurred. It is certainly a proper matter of consideration, the amount of property put at hazard in the salvage service.

It has been truly said that it rests in the discretion of the Court. But a sound discretion is not the arbitrary will of the judge. It is his duty to be governed by principles of law and sound reason.

In this case, the only remaining question is as to the amount of salvage. It has been a meritorious service, and attended

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with difficulty and hard labor. It was not a case where any especial gallantry was required, but it did require good judgment and persevering industry. No persons were in peril, and the property was in the vessel at anchor, a portion of which, from the quantity of water in the vessel, it required the peculiar experience of the Hawaiians to rescue.

In the case of Biarde and others, 1 Story, 525, Chief Justice Story remarks, that "the highest compensation which courts of admiralty are in the habit of awarding, in the most meritorious cases, is one moiety. There are exceptions, indeed, but they are where the property saved is very inconsiderable, and the gallantry and danger and difficulty of the service have been so great as seemed to require an extraordinary compensation, hardly to be measured in value." . . . "And indeed a moiety has rarely been given except in cases of derelict."

It is true that this is not a case of derelict, for a portion of the intervenients were of the crew of the ship "Natchez," and who are worthy of compensation for services beyond their agreement with the owners of the "Natchez." That can only arise, says Mr. Justice Story, when there has been an abandonment by the master and crew, without any intention to return to the wrecked property. In this case four of the crew remained by her, and exercised care and supervision over her from the day the master and the rest of the crew left her, on the 15th day of October, till the first officer of the "Italy" took possession of her on the 3d day of July following.

It is in evidence that the master abandoned her formally to the winds and the waves, although he made a sale of the ship and all the property on board to the master of the "Harmony," for one hundred dollars. The inconsistency of these acts are as palpable as the want of good faith or good judgment in making the sale. Neither the express abandonment nor the sale can be regarded as of any legal effect, under the circumstances, any further than to exonerate the seamen from any further obligations under their maritime contract. The property has never been treated, either by the salvors or owners, as derelict, which is fully proved by the correspondence of Mr. Coady and the owners. It does not appear that there was any uncommon peril to the "Italy" and her crew. There was no

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hazard of life, no storms were encountered, and the season was mild; and at that season there was no especial danger to the "Italy;" still the labor was exhausting, and required great vigilance by night and by day, and abstinence from rest, as they were obliged to raft the oil and bone from the "Natchez" to the "Italy," some miles. In addition, the voyage was long, and the preparations more than for an ordinary whaling cruise. The intervenients encountered the perils and privations of an extra northern winter, and the labor they did upon the ship was hazardous and of material service.

The question then arises as to the amount to be awarded to the intervenors, Lockman and others, for their services.

It appears, in evidence, that the master of the "Italy" gave one of them—namely, Lockman—an obligation to pay him \$1,000. I do not think this forms an exact criterion by which to award compensation; still, the proposition accords very well with my own judgment of the amount to be awarded to each of them.

It was stipulated by the parties to the suit, and an application made to the Court therefor, that the oil and bone saved from the "Natchez" should be partitioned by the Marshal and distributed as the Court shall decree, and that the balance of the property shall be sold at auction, on short notice, and the proceeds paid into Court, and so much as may be necessary to pay the costs of the Court deducted, and the balance distributed in the same proportion as the oil and bone.

In view of all the circumstances of the case, the Court is of opinion that the libellants and intervenients are entitled to one moiety of the whole property saved; and have accordingly decreed that four-tenths shall be delivered to the owners of the bark "Italy," (including the officers and crew, who are to be paid by the owners, according to their contract, for their salvage services,) and that one-tenth be distributed equally between the intervenients, Lockman and others, or their representatives.

The crew of the "Natchez" having intervened for their lay or share, the Court decreed that the remaining five-tenths, belonging to the claimants, be held in the custody of the Marshal until the further order of the Court.

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And a sale of the balance of the property as specified in the libel will be ordered, and the proceeds thereof, after the Marshal has deducted his own fees, commissions and expenses, paid into Court; and after deducting the costs of court, will be distributed in the same proportions as the oil and bone were distributed.

The claim of the intervenient, Willfong, dismissed without costs.

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THE procuring of an order to the Marshal to dispose of the libelled property in the manner decreed by the Court below, is not such an act as bars the libellants' right of appeal.

An appeal in Admiralty may be taken at any time within six months after decree, unless said decree is fully executed.

An appeal operates as a stay of execution, subject to the necessary order for the safe custody, delivery or security, or sale of the property proceeded against.

On appeal from the decision of the Chief Justice, at Chambers.

Justice ROBERTSON delivered his opinion as follows:

This is a motion to dismiss the appeal of the libellants, on the ground that they, through their Proctor, have procured the issuing of the usual order to the Marshal to dispose of the property in the manner decreed by the Court below, thus manifesting their acquiescence in the decree; and that such order has been executed by the Marshal.

Our statutory provisions in regard to proceedings in admiralty are of the most limited description, consisting merely of a few general provisions, scattered about in a somewhat disjointed manner, through the various enactments relating to the jurisdiction and practice of the Courts of Record and of the

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justices thereof at chambers. Some of those provisions, affecting cases like the present, will be found in the first clause of sec. 7, page 55, vol. 2, Statute Laws, which reads as follows:

“The Chief Justice shall have power at Chambers to adjust average claims, general and particular, decree the compensation of salvors, and to fix the responsibility of underwriters upon the application of parties concerned, and may make binding awards thereon, subject to the right of appeal, and enforce the same by execution to be issued by the clerk of said court.”

By section 11, page 57, of the same volume, the Chief Justice is empowered to prescribe the rules of practice to be observed in proceedings had before him at Chambers. The Judiciary Act of 1853 makes no additional provision in regard to proceedings in admiralty, but merely enacts that the Chief Justice shall have power at Chambers to issue process in, and to hear and determine, among other things, all cases in admiralty, subject however to an appeal to the full Court. (See Laws, 1853, p. 4, sec. 4.) No rule has ever been adopted and promulgated by the Chief Justice in regard to the time within which an appeal may be taken from any decision rendered by him at Chambers, sitting as a Court of Admiralty, nor in regard to what acts of any party interested shall constitute a waiver, on his part, of the right to appeal; nor have cases of this class been as yet sufficiently numerous to create and establish any fixed practice. We are thus left, as I apprehend, without any statutory provision, or rule of Court, or previous decision, by which we must be guided in deciding upon the motion now before us; and until the Chief Justice shall have promulgated some definite rule upon the subject, there is no limit as to the precise time within which an appeal may be taken.

Reference has been made, in the course of the argument, to the practice, in regard to appeals, of the courts of the United States, in admiralty cases. The practice in those courts, which is based upon statute, and clearly defined by rule, is characterized by that liberality which marks the proceedings of admiralty courts the world over. By the Act of Congress of 1803, appeals from the District to the Circuit Courts, in admiralty causes, are placed upon the same footing with respect to the amount in controversy, as writs of error in suits at common

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law ; and an appeal is substituted for a writ of error from the Circuit Courts to the Supreme Court. According to the construction which the acts of 1789 and 1803 have received, they authorize an appeal, in the technical sense of the term, as contra-distinguished from a writ of error, from all final decrees of the District Courts in such causes where the matter in dispute exceeds the sum or value of \$50, exclusive of costs, to the next Circuit Court ; and from all final decrees of any Circuit Court, where the matter in dispute, exclusive of costs, exceeds the sum or value of \$2,000, at any time within five years after the decree is rendered, and that, too, exclusive of the time that a party may be laboring under a disability, such as infancy, coverture, etc. (See Conkling's U. S. Admiralty, pp. 714-715.) Under the application of the 23d Section of the U. S. Judiciary Act of 1789 to admiralty causes, upon a copy of the appeal being lodged for the adverse party, in the clerk's office, where the record remains, within ten days, Sundays exclusive, after the decree is rendered, such appeal operates as a supercedeas and stay of execution ; and no execution can lawfully issue, in any case where an appeal would lie, until the expiration of the ten days. (Conkling's U. S. Admiralty, p. 719.)

In the case of the "Dos Hermanos" the courts of the United States went even beyond what might be considered ordinary liberality in permitting an appeal. In that case, one-half of the proceeds of a prize was awarded, in the nature of salvage, to a non-commissioned captor, by the District Court for Louisiana, without deducting his expenses. Upon the case coming before the Supreme Court, in 1825, upon the captor's appeal, a question was made as to whether the appeal was in time, as it appeared that, although the appeal had been prayed for and allowed in the District Court within five years, the appellant had not given the security required by law until after the expiration of that period. The Supreme Court refused to dismiss the appeal notwithstanding this apparent irregularity, Chief Justice Marshall remarking that, "the mode of taking the security, and the time for perfecting it, are matters of discretion to be regulated by the Court granting the appeal ; and when its order is complied with, the whole

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has relation back to the time when the appeal was prayed." (Curtis Dec. of the Sup. Court U. S., p. 413. See, also, the steamboat "New England," 3 Sumner's Rep., p. 495.)

I may also refer, *en passant*, to the case of the "Sally," (1 Vol. English Ad. Rep., p. 224), which was an appeal from the Vice Admiralty Court of New Brunswick, and to several other cases of a similar character, of which I have made no particular note, as showing the liberality of the English Appellate Court upon this subject. ●

The Proctor for the claimants asks the Court to dismiss the appeal in the present case, on the ground that the libellants, through their Proctor, procured the issuing of the usual order to the Marshal, thus showing their acquiescence in the decree, and that they ought to be held to have thereby perempted their right of appeal. In support of this position he cites the case of Lloyd and Clarke *vs.* Poole, (3 Hagg. Eccl. Rep., 482) in which it was held that if a party does acts in furtherance of a sentence, viz., attending the taxation of costs, he bars his right of appeal. I do not consider the case cited as entitled to any weight in the decision of the motion now before us, and I am strengthened in this opinion by what is reported to have been said, *arguendo*, by the King's Advocate in the case of the "Sally," already referred to, showing a fundamental dissimilarity in the practice of the Ecclesiastical and Admiralty Courts. He argued that, "according to the practice of the Court of Admiralty, a party can only appeal from a definite sentence, or a decree having the force and effect of a definite sentence; and, therefore, the power is reserved to him of appealing, at the same time, from all grievances that have been done previously, or inflicted by the judge from whom the appeal is brought. In the Ecclesiastical Courts, following the different practice of the canon law, it is otherwise; and if a party *proceeds to take any step after the grievance complained of*, he is held to have perempted his appeal." This, continued the learned advocate, is a distinction arising from the different processes of the civil and canon law.

I have no doubt, however, that a party may, by his acts in Court, in the course of the proceedings in an Admiralty cause, perempt his right of an appeal. For instance, where all the

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parties, as in the present case, stipulate on the record that the judge may decree a certain part of the property to be divided in specie, in lieu of ordering a sale of such property and a subsequent partition of the proceeds I, should say that each and all of the parties had barred their right to appeal from the decree, so far as it was affected by such stipulation. In the case of the "Clifton," (vol. 4, English Adm. Rep., p. 375), before the Lords of the Privy Council, which was a salvage case, the salvors were held to have perempted their appeal, under somewhat peculiar circumstances, on the ground that their proctor so conducted himself in Court, at the time the final decree was made as to costs, that they were held to have agreed, through him, to such final decree. But I do not consider that case as one to be relied on with much confidence, as an authority, for Mr. Baron Parke, in delivering judgment, concluded as follows: "Their Lordships believe that, under the circumstances of this case, the most merciful course for both parties is, that the cause should be thus put an end to, but they do not think proper to award any costs."

Was the act of the libellants' proctor, in procuring the issue of the order to the Marshal, an act in Court, and such an act as ought to be held to bar the libellants' right of appeal? I am of the opinion that it was not. I do not regard it as an act done in Court, within the proper meaning of that expression. Nor do I consider it necessary, in the absence of any rule to that effect, that either of the parties interested should have applied to the Clerk to issue the order to the Marshal. The Court had ordered the Marshal, at the commencement of the suit, to take the property into his possession to await its adjudication, and when such adjudication was had, it seems to me that it was the province of the Court, of its own accord, to instruct the Marshal to proceed to dispose of the property, in accordance with its decree, unless some of the parties interested moved for a stay of execution, or interposed an appeal, which in my opinion, ought to operate, in general, as a stay of execution. I think it would be unusually harsh if the Court should dismiss the appeal upon this ground, for I am not aware of any case in which a party has ever been turned out of this Court, upon a mere point of practice, unless where there existed a positive rule by which he might and ought to have been guided.

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But it is urged by the proctor for the claimants, that the decree of the Court below had been executed, before the libellants filed their appeal. I am of opinion that this objection is not sustained by the facts of the case, for up to the time of the hearing of this motion the Marshal had made no return ; and the only evidence before us to show that the decree had been executed, was the receipt given by the libellants to the Marshal for their share of the bone. But if both the bone and the oil had been delivered to the libellants before they took their appeal, even then it could only be said that the decree was partially executed ; for before the decree can be fully executed, there remains yet another order to be made, I apprehend, for the distribution of the proceeds of that part of the salved property which was decreed to be sold.

The apprehension expressed by the proctor for the libellants that he had taken his appeal too early, rather than too late, I think is groundless ; for, unless I have misunderstood the decree made by the Chief Justice, it is in its nature and effect final in the cause, even to the adjudication of the costs. The proctor regards the order which is yet to be made for distribution of certain proceeds, as a final decree, whereas it is merely an order in execution of the decree already made. I am not aware that any decree or order yet remains to be made by his Honor the Chief Justice, which could properly be appealed from.

In the absence of any definite rule in regard to appeals in such cases as the present, it would, perhaps, be wise for this Court, following the example of the courts of the United States, under their statutory provisions, to place appeals in admiralty causes, on the same footing with writs of error in cases at common law, under our statutes, by allowing such appeals to be taken at any time within six months after the decree is rendered, unless such decree shall have been fully executed ; and in all cases allowing an appeal to operate as a stay of execution, (see Stat. Laws, vol. 2, p. 51, Sec. 28,) subject to any necessary order respecting the safe custody, delivery on security, or sale of the property proceeded against.

I am clearly of the opinion that the motion should be refused,

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and the appeal of the libellants entertained by the Court, upon such terms as shall secure the claimants from damage.

Chief Justice ALLEN concurred that the motion should be denied, and the appeal entertained by the Court.

Mr. Bates and Mr. Griswold, for the libellants.

Mr. Montgomery, for the claimants.

SUPREME COURT—IN ADMIRALTY.

RICHARD COADY *et als.*, *Appellants*, vs. 1,200 BBLs. OIL AND 15,000 LBS. BONE, etc., SAVED FROM SHIP "NATCHEZ."

BY THE COURT :

This is a case on an appeal by the libellants from the decree of the Chief Justice in a suit for salvage, brought by an original proceeding *in rem* against 1,200 barrels of oil and 15,000 pounds of bone, and sundry other articles, saved from the ship "Natchez," wrecked in Potter's Bay, in the Ochotsk Sea.

The Court have carefully considered the testimony submitted, and the principles of law applicable to the case, and fully sustain the judgment of the Chief Justice, subject to the modification which results from the new evidence introduced. By this an error is corrected, which was innocently made by the libellants, and not from palpable laches, and changes the aspect of the case to some extent ; therefore, while the Court do not intend to relax the rules of evidence, still they regard it within a sound discretion, on an appeal, to permit an error made under these circumstances to be corrected.

By an exact account, rendered by the Marshal, of the quantity of oil and bone, and value of other property saved, it is proved that there is a deficiency from the amount as proved by Mr. Durham by estimate. The Court have taken this into consideration, and have awarded an additional proportion. It was stipulated by the parties to the suit, and an application was made therefor, that the oil and bone saved from the "Natchez," shall be partitioned by the Marshal, and distributed as the

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Court shall decree, and that the balance of the property should be sold at auction, at short notice, and the proceeds paid into Court; and so much as may be necessary to pay the costs of court deducted, and the balance distributed in the same manner as the oil and bone.

In view of the circumstances of the case, the Court is of opinion that the libellants are entitled to 35-80ths of the oil and bone, which will be distributed in kind, according to the stipulations of the parties; and also to 35-80ths of the proceeds of the sale of the remaining property, after the deduction of the fees, commissions and expenses of the Marshal and the costs of court.

Decreed accordingly.

The claim of the bark "Harmony" for salvage service, was dismissed, and also that of Geo. W. Wilfong, second officer of the bark "Harmony," without costs—Mr. Justice Robertson dissenting from this portion of the decision.

SUPREME COURT—IN BANCO.

JANUARY TERM—1858.

LEVI HAALELEA vs. DANIEL MONTGOMERY.

By the Laws of 1839, as subsequently amended by the organic acts of 1846, the entire fishing ground, lying between low water mark and the outer edge of the coral reef, or *kuanalu*, along the seaward front of an *ahupuaa* of land, is the private property of the landlord or *konohiki*, subject always to certain piscatorial rights of the tenants or *hoaatinas*.

The defendant's brother having received from the *konohiki* a conveyance of a portion of land of the *ahupuaa* of Honouliuli, by metes and bounds, but not including any portion of the fishing ground adjacent; it was held, that he acquired a common right of piscary as a tenant or occupant of the *ahupuaa*, appurtenant to the land purchased, and subject always to the rights of the grantor.

It would not have been in the power of the landlord to grant an exclusive right of fishery in the fishing ground, adjoining the land in question, and it

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was *doubtful* whether said landlord could convey her special rights therein, so as to divide the fishery into two or more parts, without infringing on the rights of tenants.

Where the exact legal signification of the terms of a deed could not be expressed in Hawaiian without great difficulty, recourse was had to the English original.

JUSTICE ROBERTSON delivered the decision of the Court as follows :

The plaintiff brings his action for the purpose of determining certain rights of fishery, now in dispute between him and the defendant, and also to recover damages from the defendant for having prohibited and prevented the plaintiff and his people, and others occupying certain lands under him, from taking fish on the fishing ground lying to seaward of defendant's land, at Puuloa, on this island.

It appears, from the evidence presented to the Court, that the land now held by the defendant, is a portion of the large ahupuaa of "Honouliuli," and was purchased, in the year 1849, by defendant's brother, Isaac Montgomery, from the late high chief, M. Kekauonohi, then a widow, who died in the year 1851, leaving the land of "Honouliuli," together with other property by will, to her second husband, the plaintiff in this action. The conveyance from M. Kekauonohi to Isaac Montgomery, was executed in the Hawaiian and English languages, and reads as follows in English :

"WARRANTY DEED.

"Know all men, by these presents, that I, Kekauonohi, of Honolulu, Island of Oahu, for and in consideration of the sum of eleven thousand dollars, to me this day paid in hand by Isaac Montgomery, also of Honolulu, Island of Oahu, the receipt of which is hereby acknowledged, do grant, bargain, sell, and by these presents convey unto him, the said Isaac Montgomery, and to his heirs, executors, administrators and assigns, for ever, all that certain lot of land, situated in the Island of Oahu aforesaid, and described as follows: Commencing at mauka north corner or point of this land at place called Lae Kekaa, at bend of Pearl River, and running along edge of Pearl River, makai side, taking in three fish ponds called Pamoku, Okiokilipi and Paakule to open sea, thence following

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along the edge of the sea (reserving all the reef in front) to end of stone wall by sea, in land called Kupaka, at the makai west corner of this land, thence running north 25° E. 283, direct to place of commencement, including an area of acres 2,244 as per plot hereto annexed.

“To have and to hold, the above conveyed premises and all the tenements and hereditaments situate thereon, with this my covenant and warranty and lawful seizers, unto the said Isaac Montgomery, his heirs, executors and administrators and assigns for ever.

“In witness whereof, the said party, Kekauonohi, has hereunto set her hand and seal at Honolulu, this 7th day of September, A. D. 1849.

“M. KEKAUONOH. [L. S.]

“Executed in the presence of Frank Manini.”

It is admitted that defendant is now the owner of the property, originally conveyed to his brother by the foregoing deed. The Court also understood the defendant to admit that he had prohibited the plaintiff and his people from taking fish on the place in controversy. And it is admitted by the plaintiff that, from and after the execution of the deed by M. Kekauonohi, she withdrew her *Luna* from Puuloa, and ceased to take or taboo any fish on the reef opposite defendant's land, up to the time of her death, and that, until recently, Haalelea never asserted any right or claim to take fish on said reef.

Upon this state of facts, the defendant claims to have, under a proper construction of the conveyance before recited, and the statutes of this Kingdom, an exclusive right of piscary, in the fishing ground lying opposite the land embraced in the deed; and the plaintiff on his part, claims the same exclusive right for himself and his tenants living on “Honouliuli,” as against the defendant and all others living on the land covered by the conveyance, or in other words, that the defendant did not acquire by his purchase, a right to take fish anywhere outside of the boundaries of the land conveyed to him, and that the people living on that land after the date of the deed, ceased to be tenants of the Ahupuaa of “Honouliuli,” and so lost their rights to piscary, under the laws of the land.

In order to a right decision of this controversy it would seem

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to be necessary in the first place, to ascertain and define what were the rights of piscary possessed by M. Kekauonohi, as Konohiki of the Ahupuaa of "Honouliuli," at the time she made the conveyance to Isaac Montgomery. To do this it is unnecessary to inquire what were the respective rights of piscary enjoyed by the Konohiki and the common people, in ancient times, because since the year 1839 those rights have been regulated and defined by written laws.

At page thirty-six of the English version of the old laws, will be found an enactment on this subject, which commences in the following words: "His Majesty the King, hereby takes the fishing grounds from those who now possess them, from Hawaii to Kauai, and gives one portion of them to the common people, another portion to the landlords, and a portion he reserves to himself.

These are the fishing grounds which His Majesty the King takes and gives to the people: the fishing grounds without the coral reef, viz: the Kilohee grounds, the Luhee ground, the Malolo ground, together with the ocean beyond.

But the fishing grounds from the coral reefs to the sea beach are for the landlords, and for the tenants of their several lands, but not for others."

This is the point at which the existing piscatory regulations of the Kingdom had their commencement, and since which, ancient custom ceased to govern the subject. His Majesty Kamehameha III., as supreme lord of the islands, and having in himself the *allodium* of all the lands in the Kingdom, did at that time, with the concurrence of the Chiefs, resume the possession of all the fishing grounds within his dominions, for the purpose of making a new distribution thereof, and of regulating the respective rights of all parties interested therein, according to written laws.

The fishing rights of both the Konohikis and the hoainas were defined and regulated by the law of 1839, which was at different times amended in some particulars, until the passage of the organic Acts in 1846, when those rights were again defined by article 5th, of chapter 6th, part first, of the Act to organize the Executive Departments. (See 1st Vol. Stat. Laws, pp. 90 to 92, secs. 1 to 7.) The part of the law to which it is

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necessary to have reference more particularly in the present case, reads as follows :

"Section 2. The fishing grounds from the reefs, and where there happen to be no reefs from the distance of one geographical mile from the beach at low water mark, shall in law be considered the private property of the landlords whose lands, by ancient regulation, belong to the same ; in the possession of which private fisheries, the said landlords shall not be molested except to the extent of the reservations and prohibitions hereinafter set forth.

"Section 3. The landholders shall be considered in law to hold said private fisheries for the equal use of themselves and of the tenants on their respective lands ; and the tenants shall be at liberty to use the fisheries of the landlords, subject to the restrictions in this article imposed."

The four succeeding sections of this law, which we deem it unnecessary to cite at length, define and guard the rights of the *konohikis*, in relation to their reserved or tabooed fish, and contain certain provisions to protect the rights of the tenants or *hoaaínas*, from unjust restrictions and exactions.

Under this statute, as we understand it, the entire fishing ground, lying between low water mark and the outer edge of the coral reef, (or *Kuanalu*, as it is called in the Hawaiian version) along the seaward front of the *Ahupuaa* of "*Honouliuli*," was the private property of M. Kekauonohi, possessed and held by her as such, subject to the piscatorial rights of the tenants living on that *Ahupuaa*. On this ground she had a common right of piscary with the tenants of "*Honouliuli*," or she was at liberty, if she saw fit, to taboo or set apart annually, one particular species of fish for her own private benefit, as provided in section 4th, or in lieu of this, she might on consultation with the tenants, as provided in section 7th, make an arrangement whereby she would be entitled to receive one-third part of all the fish caught on the ground.

Such were the rights of M. Kekauonohi in the premises at the time when she executed the deed to Isaac Montgomery, and the next question is, what portion, if any, of those rights did she thereby convey to him, or did he, by operation of law, acquire any rights of piscary on the ground in question, upon receiving that conveyance ?

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It is contended, on the part of the defendant, that by a fair construction of the descriptive part of the deed, it must be held to extend to deep water at the outer edge of the reef, thereby including all that part of the Konohiki's fishing ground lying opposite to the land conveyed to Isaac Montgomery. It is said that the expression, "to open sea," must be understood to mean, "to deep water outside of the reef," in contradistinction to the shallow water upon the reef, between the breakers and low water mark, and that the expression, "following along *edge of sea*," means following along the edge of *deep water*, outside of the reef. If this is correct, then unquestionably, the grantor conveyed away all her right and title to the fishing grounds, as well as to the dry land. But it seems very clear that this construction cannot stand without falsifying the obvious meaning of the descriptive language which follows. For if "open sea" means the deep water outside of the reef, and "edge of the sea" means the edge of such deep water, the stone wall which is described as being *by sea*, in land called Kupaka, must have extended out to the seaward edge of the reef, a proposition which has not been asserted in argument, and which, on reference to the plan annexed to the deed, appears to be conclusively negatived. So the expression "reserving all the reef in front," would seem to be inconsistent with the idea that the line ran along the outer edge of the reef, for in that case there would be no reef *in front* of the line. That the line ran along the inside of the coral reef, seems to us clear from the language used in the Hawaiian version of the deed, which reads as follows: "Aole nae e hookomo ana i ka papa koa mawaho." We should translate this expression, *not including, however, the coral reef outside*. Again, the last line of the survey is described as running from the end of the stone wall, north 25° east, by compass, 283 chains, to the place of commencement, and it is not pretended that this line extended out to the outer edge of the reef. If such is the case, it is a fact that could be readily ascertained by measurement. But the surveyor's plan clearly indicates the reverse. It is very evident, then, that no part of the fishing ground is included within the surveyed metes and bounds of the property conveyed to Isaac Montgomery.

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But, it is argued by defendant's counsel, that M. Kekauonohi's right of piscary in the fishing ground in question, passed to Montgomery as an appurtenance to the land, by virtue of the clause which, in the Hawaiian version of the deed, reads thus : "A me na mea paa a pau e waiho ana maluna iho, a me na mea e pili pono ana," and in the English version, thus : "And all the tenements and hereditaments situate thereon." It is said that the words, "a me na mea e pili pono ana," are sufficiently broad in their signification to carry everything appurtenant to the land embraced in the conveyance, and that the Court ought to regard the Hawaiian version of the deed as controlling, wherever there appears a difference between that and the English, for two reasons : First—Because the grantor herself was a native, and a person of intelligence, and must, therefore, be presumed to have intended to convey whatever would pass under the words of the deed, as expressed in her own language ; and, secondly, because the Court has decided in several previous cases that, in construing the statutes of the Kingdom, which are enacted in both languages, wherever an irreconcilable difference exists between the two versions, the Hawaiian must govern. On the other hand, it is argued that the grantee, who is an Englishman, received the deed in both languages, thus accepting the English version as the exact counterpart of the Hawaiian ; and that, therefore, he and those claiming under him, should be bound by the English version ; that the deed in both versions forms but one instrument, and that if the language of the one is altogether inconsistent with that of the other, which, however, is not conceded, the proper course would be to declare the instrument void for uncertainty.

This involves a question of considerable magnitude, the decision of which may affect the rights and interests of many individuals throughout the Kingdom. After careful reflection upon the point, we are of the opinion that it would be both unsafe and unreasonable, for the Court to hold that the Hawaiian, and not the English version, should control in this instance, if the difference contended for by the defendant does really exist, which, we think, is not clear. It is true this Court has repeatedly ruled, as stated by the defendant, that, in the case of an irreconcilable difference between the Hawaiian and

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English versions of a statute, the former shall control. (See *Metcalf vs. Kahai*, 1st Haw. Rep., p. 225; *Hardy vs. Ruggles et als.*, *ibid*, p. 255.) But it seems to us that the same considerations which constrained the Court so to decide in that case, do not exist in the present instance. The deed before us, with the exception of those parts of it which are descriptive, consists of a printed formula, in the two languages, which has been extensively used here, in dealings between natives and foreigners, since the enactment of laws requiring conveyances of real estate to be made in writing. The English version of this formula is, of course, the original, and the Hawaiian merely a translation. There do not exist in the Hawaiian language, two words which would exactly represent the two English words *tenements* and *hereditaments*. The exact legal signification of those terms could not be expressed in Hawaiian without great difficulty, and therefore words, which if used in some other connection, or under other circumstances, would convey a widely different meaning, have, when used in the printed formula of conveyance now before us, been accepted by the general consent of natives and foreigners using such formula, as meaning precisely the same things, and neither more or less than those two legal terms. So far then as purely legal phraseology, or words of technical import, are concerned, it would seem to us both unsafe and unreasonable, to hold that the Hawaiian translation, and not the English original, should govern, when a question arises upon the construction of any part of the deed, where such legal or technical language is used. Such a course would unbar the door to endless litigation and fraud, and involve our courts in a maze of uncertainty.

It is contended, further, on the part of the defense, that the conduct of the grantor, in withdrawing her *luna* from Puuloa, at the time of her execution of the conveyance, and in subsequently, up to the time of her death, forbearing to take or taboo any fish on the reef opposite the land sold to Montgomery, and the like forbearance on the part of the plaintiff, for several years, afterwards, are strong evidence in favor of the defendant, and facts from which it may be fairly inferred, that M. Kekauonohi intended to grant away the fishing ground, or, at least, all her rights in the fishery. To this it is replied, that such a

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grant cannot be inferred from circumstances, or from the conduct of the grantor, but must be found, if at all, in the express language of the deed.

As to the fact of her withdrawing her *luna* from Puuloa, after the sale of that land to Isaac Montgomery, we consider it a natural consequence of the sale, and of slight significance as to any bearing it may be supposed to have upon the disputed question of the fishery. If, however, there was any doubt as to the grantor's intentions, arising from the use of unusual or ambiguous language, then, the fact of her subsequent forbearance to take or taboo fish, upon the place in question, might be regarded as evidence tending to sustain the construction contended for by the defendant. But, it is clear to our minds, for the reasons already stated in remarking upon the descriptive part of the deed, that she did not intend to include therein, or to convey thereby, any part of the fishing ground to Montgomery; nor did she convey to him her individual rights of piscary, under the words, "tenements and hereditaments situate thereon."

None of the rights of piscary possessed by M. Kekauonohi as owner of the fishery, could have passed as a mere appurtenance to the piece of land conveyed to Isaac Montgomery. She could have transferred the fishery, or her right therein, only by an express grant, *eo nomine*. Had she made a deed even of the whole Ahupuaa, by metes and bounds, not including the fishery, nor expressly naming it in the conveyance, it is doubtful if either the fishery or her rights therein would have passed to the grantee.

Again, if the grantor had conveyed the fishery, or her individual rights therein, by name, to Isaac Montgomery, that would not have conferred upon him the *exclusive* right which is now set up by the defendant, because M. Kekauonohi herself was not possessed of an exclusive right. It may even be doubted whether she could have conveyed away the portion of the fishing ground lying opposite to Puuloa, or her special rights therein, so as to divide the fishery, without infringing on the rights of the tenants living on "Honouliuli." Certainly if her grantee had tabooed one kind of fish, on his part of the ground, while she tabooed another kind upon the other part, the rights

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of the tenants would have been violated. And if she could have divided the fishing ground into two parts, she could have divided into twenty, and so have rendered the rights of the tenants worthless.

But, while we are clearly of the opinion that M. Kekauonohi did not convey any part of the fishing ground, or of her individual rights therein, to Isaac Montgomery, we are also of opinion that, when he received a conveyance of a portion of the Ahupuaa of "Honouliuli," he acquired along with it a common right of piscary in the fishing ground adjacent. That is to say, he became, for the purposes of the law, governing this subject, a tenant of the Ahupuaa, and as such entitled to take fish in the sea adjoining. We understand the word tenant, as used in this connection, to have lost its ancient restricted meaning, and to be almost synonymous, at the present time, with the word occupant, or occupier, and that every person occupying lawfully, any part of "Honouliuli," is a tenant within the meaning of the law. Those persons who formerly lived as tenants under the Konohikis but who have acquired fee simple title to their *kuleanas*, under the operation of the Land Commission, continue to enjoy the same rights of piscary that they had as *hoainas* under the old system. (See Joint Resolution on the subject of rights in lands, etc., vol. 2, Statute Laws, p. 70.) If any person who has acquired a *kuleana* on the Ahupuaa of "Honouliuli," should sell and convey his land, or even a part of it, to another, a common right of piscary would pass to the grantee, as an appurtenance to the land. In that case it would not be necessary, we apprehend, to mention the right of piscary in the conveyance—it would pass as an incident. (See Kent's Com., vol. 4, p. 517; Comyns's Digest, vol. 4, title Grant, E. 11.) Here, we think, is the great distinction between the rights of the Konohiki, and those of the tenant or occupant, for, while the former holds the fishery as his private property, the latter has only a right of piscary therein, as an incident to his tenancy. This marked distinction in their respective rights, must create a corresponding difference in regard to the transfer of those rights.

As the conveyance by the owner of a *kuleana*, of a part of his land to another, would create such a tenancy in the grantee

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as would entitle him to a common right of piscary, so, in our opinion, the conveyance to Isaac Montgomery, by M. Kekauonohi, of a part of the Ahupuaa, created such a tenancy, as carries with it, as an appurtenance thereto, under our laws, a common right of piscary; subject, always, to the rights of the grantor, and her legal representatives.

No specific damage having been proved by the plaintiff, we think he is only entitled to recover nominal damages.

Let judgment be entered for the plaintiff, as of the last day of term, in the sum of five dollars damages, together with the costs of suit.

A. B. Bates, Esq., for the plaintiff.

J. Montgomery, Esq., for the defendant.

January, 1858.

SUPREME COURT—IN CHANCERY.

SUSAN REYNOLDS *vs.* JNO. E. BARNARD, E. O. HALL AND J. W. MARSH.—BILL IN EQUITY.

The wife of a lunatic agreed to release her right of dower in the entire real estate of her husband, upon receiving a fee simple of certain premises in Honolulu; but afterwards applied to the Court that the said property be put into the hands of Trustees for the benefit of herself and children. Subsequently she filed a petition praying that the fee simple might be awarded to her alone.

The Court decreed her a life estate only in the premises, and the remainder to the children.

Decision of Chief Justice ALLEN.

The bill alleges that Stephen Reynolds, the husband of the complainant, was declared a lunatic on the 15th of August, 1855;

And that Messrs. Bates and Pitman were appointed a Committee to take charge of his person and estate on the 16th of August, 1855;

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And that the complainant was induced to release her right of dower on the entire real estate of said Reynolds, upon receiving \$8,000 in cash or the fee simple of the "White Swan premises";

That on the 13th of March, 1856, said committee obtained an order of this Court to convey said premises to said Susan Reynolds in fee simple, or to whomsoever she should name.

That on the blank day of March, 1856, the letter addressed to Judge Lee was presented to Susan for signature, to which she objected because it contained the names of the four children, and a request to Judge Lee to convey the premises to her and her children, that she *utterly refused and never did sign it*.

That on the 21st of March, 1856, complainant was presented by J. W. Marsh with a release of her contingent right of dower to the estate of her husband, the consideration for which was that a conveyance had been or was to be made of the "White Swan" to her and her four children, to be executed by said committee to trustees for their use.

The petitioner objected to sign it while the names of the children remained in it; that Mr. Marsh said it was a mere matter of form, and that said committee would execute to her a fee simple title in her own right as soon as she signed said release and not before, and that relying upon the statements of said Marsh she did sign the release.

That when Mr. Cooper came to get her acknowledgment she asked him if the children's names being in the deed would affect her interest and he said he thought not, and that upon their statements she then acknowledged her signature.

That about the same time a deed was executed by said committee to the defendants in trust, for said complainant and the children, subject to declaration of trust to be by said trustees and said complainant duly signed.

That complainant was never consulted about this deed, and that it does not convey to complainant the fee simple property in accordance with the agreement between complainant and said committee.

That said declaration of trust was presented to complainant for signature, and she utterly refused to execute it. Com-

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plainant concludes with a prayer that said trustees be ordered by the Court to execute to said Susan Reynolds, a fee simple title to the "White Swan," in accordance with the order of the Court now on file, as being payment in full for her release of her contingent right of dower, and that all the rents and profits of said property, from and after the 15th of August, 1855, until the hearing of this cause, be accounted for, and for further and other relief, etc.

Respondents Hall and Barnard deny all knowledge of the proceeding set forth in the bill, except that they were requested to allow their names to be inserted in the deed of trust.

Respondent Marsh admits that Stephen Reynolds was declared a lunatic on or about the 15th of August, 1855, and that Pitman and Bates were appointed a committee to take charge of his estate and person.

That he was employed as the attorney of Mrs. Reynolds (associated with Mr. Harris) for the purpose of negotiating the terms on which she would release her right of dower.

That complainant instructed us to insist on the large price for her dower on account of her children, and to have the same secured to her and her children. That the bargain was made and the deed executed in pursuance of said bargain, and that the deed is in exact conformity with the direction and assent of complainant.

That the letter referred to as being directed to the Chief Justice, was signed voluntarily by complainant, and said letter did express, at that time, the full and unequivocal wishes of complainant as expressed by her to respondent; and that it is *absolutely untrue* that she objected to signing said letter on the ground that it directed the conveyance to be made to herself and children jointly, or that she objected to signing it on any grounds whatever.

That said letter was written by order of said complainant agreeably with her wishes.

That complainant *signed said letter* in presence of respondent having fully comprehended its contents and approved thereof.

That respondent has prepared a declaration of trust for complainant to sign which complainant refused to sign.

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Traverses the allegation that the trustees have attempted to *force* any stipulations or covenants upon complainant.

Prays the order of the Court in regard to the partition of the receipts, rents and profits arising from said property, which he should set apart for and pay over to said Susan Reynolds.

Denies that complainant directed respondent to obtain for her a *fee simple* title to the "White Swan" premises, but on the contrary, that she did repeatedly instruct defendant to have the papers so drawn that the property should, on her death, pass to the children.

Denies ever having told complainant that the children's names being in the letter, release and deed was a mere matter of form and would not affect her having a fee simple title.

It was regarded as very important for the sale of Mr. Reynolds's estate that the widow's right of dower should be extinguished, and in pursuance thereof the committee referred to in the bill made application to the Court setting forth the great importance of extinguishing the right of dower and offered to convey to the widow, the present complainant, the "White Swan" premises in fee simple as a consideration therefor. Whereupon an order was made giving authority to the committee to convey said "White Swan premises" to said Susan Reynolds in fee simple, or to whomsoever she should name.

That subsequently Chief Justice Lee received a letter signed Susan, wife of Stephen Reynolds, in which she writes as follows :

"Whereas, I have been informed that you have appointed a committee respecting the estate of my husband, Stephen Reynolds ; that they are to give me, or to such persons as I may choose, a piece of land at the corner of Nuuanu and King streets, which is known as the "White Swan Hotel premises," as my portion out of the estate of my husband : Therefore, I consent to such division as proper, and make no objection. Besides this, I desire that the said land be given to me and to the four children of me and my husband. Their names are as follows : Edward Jackson Reynolds, a son ; Evelina Reynolds, a daughter ; Harriet Reynolds, a daughter ; and the married daughter, Matilda E. Wilmath ; let this property, however, be put into the hands of such as will take care of it for me and the

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children. The following are the names of the persons I would nominate, viz : John E. Barnard, Edwin O. Hall, and James W. Marsh. They will oversee, improve and dispose of said place and divide the proceeds according to the agreement which they are to cause to be written as has been agreed to us (I and the children) this day.

"This is the sum of what I have to request of you.

"With respect, etc.,
(Signed,)

"SUSAN,
"Wife of Stephen Reynolds.

"Honolulu, March, A. D. 1856."

Whereupon a deed was executed by the committee to said respondents, in which they demised, released and for ever quit claimed to them, in trust and confidence for Susan Reynolds, and the children of herself and Stephen Reynolds, named Edward Jackson, Evelina, Harriet, and Matilda E., subject to the declaration of trust, to be by the said Trustees and the said Susan Reynolds hereafter duly signed and executed, but which has not been done, as the parties have been unable to agree upon the terms of the trust. The said Susan made a release of dower in all other portions of the real estate owned by the said Stephen Reynolds.

It appears that the complainant denies having signed the foregoing letter, but I am satisfied, from the evidence, that she did sign it, at the time she signed the deed releasing her dower. She was, evidently, very much embarrassed to decide on the course best for herself and her children, and she, doubtless, has not the clearest recollection about the transaction.

At the time the deed was executed, it is in evidence by Mr. Jarrett, the witness to her signature, that she demurred very much to signing it, especially if the names of the children were to be in the conveyance of the "White Swan" premises to her, but being advised to sign it she did so.

It appears further, that when the Register of Conveyances called on her for her acknowledgment of the deed of release of her dower, that she stated that the property (meaning the "White Swan" premises) was to be hers for life, and after her death to go to her children.

It appears that she connected in her mind during all the

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negotiation the ultimate right of the children to the property, but still nothing definite was done in relation to a declaration of trust as contemplated by the deed and by her letter.

To have her rights in this property clearly defined she has filed this complaint, praying that a fee simple to the "White Swan" premises may be awarded her. At one time she had a right to insist on this, at the time the order of the Court was made authorizing the committee to convey the "White Swan" premises to her, but she thought proper to request the conveyance to be made to herself and children as before stated, and which was so made, subject to a declaration of trust, which was so declared in the deed from the committee.

There is always a liability to misunderstand negotiations between foreigners and natives, on account of the want of knowledge of the language by both parties, in which they interchange their views. So far as I am able to judge of the intentions of Mrs. Reynolds from her letter, and from her refusal to sign that letter during repeated meetings for that purpose, and from the testimony, if the names of the children were to be in the deed, she expected the benefit of the property while she lived, and I think, in justice, she is entitled to the entire rents and profits during her life of the "White Swan" premises from the date of the deed of the committee to her, after deducting the necessary expenditures for repairs and commissions to trustees for taking charge of the same. This seems to me to embody the true spirit of the declaration of trust, as contemplated by the parties, and a decree will be made in accordance with the foregoing opinion.

The Court, entertaining the opinion that the complainant is entitled to the rents and profits during her life only, and not to a fee simple, deem it imperative for the rights of the children as named in the deed, they being entitled to the remainder, that the trustees should continue to discharge the duty imposed upon them, to take charge of the estate, to keep the same in good condition for rent, and after deducting reasonable commissions, to pay the balance to the complainant or her order. Costs to be paid by respondents.

Mr. Hinton for complainant.

Messrs. Harris and Marsh for respondents.

April, 1858.

Wetherbee v. Schooner "Golden State."

SUPREME COURT—IN ADMIRALTY.

WETHERBEE vs. SCHOONER "GOLDEN STATE.

The Court, under the circumstances, declined to take jurisdiction, remitting the case *ad forum loci contractus*.

The respondent filing a good and sufficient bond to the libellant.

At Chambers, before Justice ROBERTSON, Acting as Chief Justice, 12th March, 1858.

Henry Wetherbee, a resident and citizen of the State of California, filed his libel against the schooner "Golden State," of San Francisco, and Capt. W. S. Tuttle, to recover the sum of five hundred dollars, as the stipulated penalty for the alleged non-fulfillment of a charter party, entered into by these parties, at San Francisco, on the 28th December last, by which Capt. Tuttle chartered the said schooner to the libellant, to proceed to Albion River for a cargo of lumber, to be delivered at this port.

The respondent filed a sworn plea, supported by the affidavit of Capt. Candage, setting forth, in substance, that the parties are citizens of the United States, resident in San Francisco; that he has a good and sufficient defense to the claim on its merits; that he is about to return immediately to San Francisco in the schooner "Golden State;" that the charter party referred to in the libel was entered into at San Francisco; that if the same has been broken, the breach took place in California, where the witnesses to all the facts and circumstances of the case reside; that if the cause should go to a hearing before this Court, he would be compelled to ask for letters rogatory, to take testimony in California; and that, previous to the filing of the libel, he had tendered to the proctor for the libellant, a bond for the payment of any judgment that might be obtained against him, on the charter-paper, in California, if the libellant would institute proceedings there.

Upon this statement of facts, the respondent prayed the Court to decline jurisdiction in the cause; to remit the parties to the courts of their common country, and to dismiss the libel with costs and a reasonable counsel fee, to be taxed against the libellant.

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Counsel having been heard on both sides, the Court decided as follows :

Per Curiam : Touching the question of jurisdiction raised by the plea of the respondent Tuttle, I would remark, that I had occasion to examine the laws and the authorities bearing upon this question, when the case of Williams *vs.* Lawrence *et als.* was before the Court, and I fully concur in the doctrine laid down by Chief Justice Lee in that case, as follows : "The sound doctrine in my opinion is that, though the Admiralty Courts of this country are not bound to take jurisdiction of controversies growing out of maritime contracts, between foreigners having no domicile in this country, as they are when the parties are subjects or residents here, yet they may lawfully exercise it, and ought to do so or not, as a sound discretion, and the claims of justice may demand." (See Williams *vs.* Lawrence *et als.*, 1st Hawaiian Reports, page 296.)

The facts and circumstances of the present case are such that I think the respondent may, with a good grace, ask the Court to remit the parties to the tribunals of their own country, for an adjudication of this controversy. I will not stop to enumerate the various circumstances of the case, as disclosed upon the pleadings, which have led me to this conclusion, but having examined these pleadings with care, I am clearly of opinion, that if ever a cause could arise in which the Court ought to decline to exercise its jurisdiction, this is such a cause, and the parties may with great propriety, and without the slightest injustice to the libellant, or jeopardizing his rights, be remitted to the courts of their common country.

I will therefore dismiss the libel with costs, upon condition that the respondent tenders to the proctor for the libellant a good and sufficient bond, similar to that stated in the plea to have been tendered to him previous to the commencement of proceedings, for the respondent's subjection, for a reasonable time, of the schooner "Golden State," or other property to the value of \$1,000, to the jurisdiction of the District Court of the United States for the District of California, to meet the libellant's claim.

Bond given, and cause dismissed accordingly.

J. Montgomery, Esq., for libellant.

A. B. Bates, Esq., for respondent.

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SUPREME COURT—IN BANCO.

JOHN H. WOOD *vs.* J. M. ELDERTON AND J. W. E. MAIKAI—
GARNISHEE.

No privity of contract exists between a public disbursing agent of the Government moneys and the officers or servants of the Government, among whom such funds may be ultimately distributed. Therefore, the money passing through the hands of such agent can not be attached by the process of garnishee, by the creditor of a Government official.

JUSTICE ROBERTSON delivered the judgment of the Court as follows :

This case comes before the Court on exceptions to the decision of the Police Justice of Honolulu, who, while rendering judgment against the principal defendant for the amount of plaintiff's claim, discharged the garnishee.

It appears from the statement of facts in the case, that at the time process was issued from the Police Court, the defendant was a captain of artillery in his Majesty's service, and the garnishee was paymaster of the troops. Process was served upon the latter, under the Act of 1856, with the view of attaching in his hands, the monthly pay of the defendant, to meet the plaintiff's claim, and the principal point now raised by counsel for the garnishee is, that in his official capacity as Paymaster General he cannot be held liable as the trustee of the defendant, nor can the money passing through his hands, as a disbursing agent of the Government, be attached by process of garnishee.

That Mr. Maikai could not be considered as the trustee of the defendant in respect of his pay as a military officer, coming through the hands of the former, as Paymaster of the King's troops, is in our opinion quite clear, and we think the argument of Mr. Maikai's counsel is well sustained by authority. (See Cushing's Treatise on the Trustee Process, p. 59 ; Kent's Commentaries, vol. 2, p. 488, note c.; Wendell *vs.* Pierce, 13 N. H., 502, cited in U. S. Digest, vol. 7, p. 467, sec. 7 ; Opinions U. S. Attorney Generals, vol. i., p. 604.)

No privity of contract existed between the defendant and Mr. Maikai, which could render him chargeable as the "agent,

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factor or trustee" of the former, in respect of his pay as an officer. The funds entrusted to the latter, as a disbursing agent of the Government, so long as they remain in his hands in his official capacity, are the funds of the Government, and not of the individuals among whom they are ultimately to be distributed. The Paymaster is not their debtor.

In the case of *Chealy et al. vs. Brewer and Trustee*, in the Supreme Court of Massachusetts, in which a county treasurer was summoned as the Trustee of the principal defendant, and disclosed that he had in his hands as such treasurer, at the time of the service of the writ, a sum of money which was due to the defendant, for his services as a juror, which sum he was by law obliged to pay to the defendant, the Court decided that he could not be charged as trustee of the defendant. Justice Sedgwick, after explaining the opinion of the Court, said: "The consequence of this opinion is, that a public officer who has money in his hands to satisfy a demand which one has upon him, merely as a public officer, cannot for that cause be adjudged his trustee." (See Mass. Rep., vol. 7, p. 260.)

A case still more directly in point than the above, has been decided in the Supreme Court of the United States. That was one of six cases depending upon the same principle, brought before that Court by writs of error from one of the State courts of Virginia. Six writs of attachment had been issued by a Justice of the Peace, at the suit of boarding house keepers against certain seamen of the frigate "Constitution." The writs were laid on moneys in the hands of the Purser, due to the seamen for wages. The money was afterwards paid to the seamen by the Purser, in disregard of the attachments, by order of the Secretary of the Navy.

Justice McLean, in delivering the judgment of the Court, said: "The important question is, whether the money in the hands of the Purser, though due to the seamen for wages, was attachable. A Purser, it would seem, cannot in this respect, be distinguished from any other disbursing agent of the Government. If the creditors of these seamen may, by process of attachment, divert the public money from its legitimate and appropriate object, the same thing may be done as regards the pay of our officers and men of the army and navy; and also in

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every other case where the public funds may be placed in the hands of an agent for disbursement. To state such a principle is to refute it. No Government can sanction it. At all times it would be found embarrassing, and under some circumstances it might be found fatal to the public service." (Buchanan *vs.* Alexander, Curtis' Dec. Sup. Court, U. S. vol. 16, p. 10.)

We are all of the opinion that the supposed trustee in the present case was rightly discharged by the Court below.

Judgment affirmed.

Mr. Hinton, for the plaintiff.

Mr. Bates, for the trustee.

April, 1858.

SUPREME COURT—IN PROBATE.

IN THE MATTER OF THE ESTATE OF L. H. KANIU, DECEASED.

A verbal will, made and published according to the custom of the country, antecedent to the enactment of the Organic Laws of 1846, held to be valid.

At Chambers, before Associate Justice ROBERTSON.

The petitioner, David Kalakaua, sets forth in his petition, that L. H. Kaniu, a female chief of this Kingdom, deceased, at Honolulu, in the year 1843; that he was the adopted son of the deceased, and grandson of her brother; and that at the time of her death she was possessed of a considerable amount of real property, which she bequeathed verbally, in accordance with ancient usage, to the petitioner, directing her husband, the late Kinimaka, to take care of the said property for the benefit of the petitioner, who was then an infant, and he now prays to be permitted to prove such verbal will of Kaniu, and that letters of administration on her estate be granted to him.

Citation was issued to Pai, the widow of Kinimaka, and to the guardian *ad litem* of his minor heirs, to appear and contest this application.

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It was admitted at the hearing, by the counsel for the heirs of Kinimaka, that up to the year 1844, the chiefs, by the custom of the country, were in the habit of passing their estates by verbal wills, with the knowledge and approval of the King and Premier, and that such wills were recognized by the authorities as binding and operative, and that coverture did not affect the right to make a will.

Nauhele, formerly a member of Kaniu's family, testified in substance, that Kaniu died in Honolulu, in the year 1843, leaving a husband, Kinimaka, who died last year; that Kaniu had no child of her own; that at the time of her death she was possessed of real estate on Hawaii, on Molokai, in Honolulu, and in Lahaina; that the petitioner's grandfather, Aikanaka, and Kalailua, the mother of Kaniu, were brother and sister; that Kaniu, a few days previous to her death, bequeathed all her property, verbally, to the petitioner, in presence of Governor Kekuanaoa, Kahina, the witness, and others; and that at the great division of lands, in 1844, Kinimaka went before the King and divided the lands left by Kaniu, as in his own right.

M. Kekuanaoa testified, in effect, that a short time previous to her death, Kaniu sent for him to hear what she had to say respecting the disposition of her property; that he was at the time Governor of this Island, and Judge of the Court of Oahu, and that it was usual in those times for persons who were dying to send for him, that he might hear, as agent for the King, what they had to say in relation to the disposal of their property; that he asked Kaniu, in presence of her husband, "Who do you wish to be your heir?" When she replied that David Kalakaua was to be heir to all her property; that he suggested to her the propriety of leaving the property in the hands of Kinimaka until David should become of age, to which she assented, and that he understood Kinimaka to agree at that time to this disposition of the property; that immediately after Kaniu's death, Kinimaka went to Lahaina to inform the King and Premier, while the witness, at the same time, wrote to the Premier notifying her that Kaniu had disposed of her property in the manner before stated; that he received a letter from the Premier, in reply, stating that the King had given all the property to Kinimaka, which the witness afterwards told the

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Premier was not in accordance with the will of Kaniu, to which she replied : " Well, the King has done it ;" that Kaniu was of higher rank than her husband, who was but a petty chief ; that she had told the witness some time before she made her will that she had adopted David Kalakaua, and that he thinks this was antecedent to the enactment of any statute regulating the adoption of children.

Charles Kanaina testified, in substance, that at the time Kaniu died, he was at Lahaina with his wife, M. Kekauluohi, who was at that time the Premier of the Kingdom ; remembers that Kinimaka came to Lahaina, and, in the presence of witness and several other chiefs, informed the Premier that Kaniu was dead, and that she had bequeathed her property to the petitioner, to which the Premier replied : " That is good, if you and your wife agreed to do so, it is right the property should go to the *moopuna* ;" that the Premier at the same time received a letter from the Governor of Oahu, informing her to the same effect ; and that, a short time afterwards, Kinimaka told the witness, in Honolulu, that he was to have charge of the property during his life time, and after that David was to have it.

Per Curiam. Upon the facts of this case, as they appear from the evidence adduced, I am of the opinion that the application of David Kalakaua must be sustained. I think there can be no reasonable doubt that Kaniu, a short time before her death, made and declared a verbal will, by which she bequeathed all her separate property, both real and personal, to the petitioner, giving directions, at the same time, that her husband, Kinimaka, should hold and take charge of the property for the heir until he should become of age.

As to the validity, in law, of such a verbal will, made and published according to the custom of the country, at any time antecedent to the enactment of the Organic Laws, in the year 1846, I have no doubt. Chiefs and others, possessed of property, were in the habit, in those days, of passing their estates in that manner, and their verbal wills were recognized as binding and operative to all intents and purposes.

It may be objected in the present case, that the petitioner has failed to show that the King and Premier approved the

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will of Kaniu, in his favor, and that, therefore, it ought not to be held valid. But this objection, it seems to me, cannot be regarded as a sound one, because the King, I think, had not the power, under the circumstances, even if he had so intended, which does not seem clear, to annul the will of Kaniu, and substitute Kinimaka as her heir, in the place of David Kalakaua, whom she had expressly nominated. Nothing but some strong legal objection could have justified the annulment of the will. It was made subsequently to the adoption of the old Constitution, which guaranteed protection alike for chiefs and common people, in their lives, liberty and property. The law which regulated the descent of lands to heirs, at the time of Kaniu's death, was approved at Lahaina, on the 9th day of November, 1840. According to the provisions of that law, it does not appear to me that the express approval of the King and Premier was necessary to validate the will of Kaniu. The language is as follows: "Be it furthermore enacted in relation to lands which Kamehameha 1st and Kamehameha 2d, gave to land agents, that after the publication of this law respecting taxation, whenever any of those land agents dies, his heir shall render an account to His Majesty the King of the lands which belonged to the deceased, and these shall return one third of those lands to the King." According to this rule all the lands, whether few or many, of every man who dies shall be divided. But if two months elapse after the death of any person, and the heir neither present himself before the King nor send a written notice, then the lands of the heir shall be divided equally. Hereafter the lands of all heirs shall be divided thus, when the King is not notified: "From this time forth, the King and Premier must be informed of all bequests of lands and whatever relates to the heirs." (See old Laws, pp. 47 and 48, Art. 14.) Nothing is said in this statute of the *approval* of a will, by the King and Premier, but, simply, that they should be duly *notified*, without delay. This provision was fully complied with in the present instance, by the official notification of the Premier by the Governor of Oahu, and the verbal report of Kinimaka.

Again, it may be objected further, that it would not be safe, after the lapse of so great a length of time, to allow a nuncu-

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pative will, the terms of which are not shown to have been reduced to writing within a reasonable time after the death of the testator, to be proved solely by the oral testimony of witnesses, whose recollection of particular facts, at so great a distance, may have become indistinct and unreliable ; and that the petitioner, or his relatives, ought to have taken steps to assert his alleged rights at an earlier day. To these objections, it is answered that, Governor Kekuanaoa has given some testimony to show that the terms of Kaniu's will were reduced to writing, about the time she declared it verbally in his presence, and that the writing was then in the possession of Kinimaka ; and that the petitioner, who only became of age about sixteen months ago, did, as soon as was convenient thereafter, commence proceedings for the recovery of the property bequeathed to him by Kaniu, which proceedings abated by the death of Kinimaka.

It appears to me that the position of the several witnesses who have testified, at the time when Kaniu's death took place, and the means of knowledge which they consequently possessed, were such as to add greatly to the credibility of their testimony ; and, in the absense of any statute limiting the time within which a will may be proved, I think the Court would not be justified, notwithstanding the lapse of so long a period of time, in rejecting, even a verbal will, made in accordance with the law of the land as it then stood, the proof of which is so clear.

My judgment is that the verbal will of L. H. Kaniu, made in the year 1843, by which she bequeathed all her property to David Kalakaua, is duly proven, and that letters testamentary thereon, with copy of this judgment annexed, be issued to him, the said David Kalakaua.

Mr. Harris, for petitioner.

Mr. Bates, for the heirs of Kinimaka.

May 3d, 1858.

SUPREME COURT—OCTOBER TERM—1858.

ONI vs. JOHN MEEK.

Nor in the power of a konohiki to alienate a single right, conferred by law to the tenant (*hoaa*ina.)

A *hoaa*ina, holding his land by virtue of a fee simple title, is forever freed from the labor formerly due (under the ancient system) to the Government and the konohiki.

If he performs such labor, it is neither by force of law or custom, but in fulfillment of a private contract.

At the passage of the Act of the 6th August, 1850, the former rights of the *hoaa*ina to pasture his animals on the lands of the konohiki, ceased to exist.

The term *people*, as used in the seventh section of the Act of 1850, held to be synonymous with the term *tenants*, as used in the law relating to private fisheries.

Whatever private agreement, as to pasturage, that may have been made between the tenant and the konohiki can not affect the rights of the konohiki's lessee of land, unless he had special notice of such agreement and bound himself to respect its terms.

Justice ROBERTSON delivered the decision of the Court, as follows :

Plaintiff brought an action against the defendant, in the Police Court of Honolulu, to recover the value of two horses, taken by the defendant on his land at Honouliuli, and afterwards impounded and sold, as estrays. The defendant agreed that judgment should be entered against him in the Court below, reserving by consent his right to appeal, in order that the case, which involves some questions of great importance, and will determine the rights of many other persons besides the present plaintiff and defendant, might be heard and decided by this Court.

It appears, by the evidence submitted to us, that the defendant holds, under three several leases, the entire kula land of the ahupuaa of Honouliuli, with the exception of certain portions expressly reserved by the terms of the latest lease, made on the 16th day of February, 1853 ; that the plaintiff is a *hoaa*ina of Honouliuli, residing on some part of that ahupuaa,

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either upon land awarded to him as a *kuleana*, by the Land Commission, or otherwise ; and that two horses belonging to him were seized as estrays by the defendant's order, on some part of the land leased to him, and carried to the Government pound, where they were subsequently sold under the estray law.

During the argument of the case, great stress was laid by the plaintiff's counsel upon the clause in the lease of the 16th of February, 1853, which reads as follows, viz: "Aole e hiki i keia hoolimalima ke kue aku i ka pono o na kanaka e noho ana malalo o ka malu o ka aoao mua." That is to say: "This lease shall not be construed as conflicting (or interfering) with the rights of the people living under the shade of the party of the first part (the konohiki.)" He argued that by this clause the rights of the plaintiff, and all others living under the shade of the konohiki, were expressly reserved by the grantor, Mr. Haa-lelea ; and that those rights included the right of pasturage for their animals. Neither the lease of the 3d of March, 1846, which covers the Ili of Lihue, nor that of the 15th of July, 1851, which covers the Ili of Waimanalo, contain any clause parallel to the clause we have just quoted from the lease of the 16th of February, 1853. So that before the plaintiff could claim to recover, by force of the reservation in favor of the rights of the people living under the konohiki, made in the lease of 1853, he must first prove that his horses were seized on the land covered by that lease, because it is expressly declared in that lease that neither the Ili of Lihue nor the Ili of Waimanalo are included in it, and that the terms and conditions of the several leases made in 1846 and in 1851, are not affected in any way whatever by the lease of 1853. No evidence having been introduced by the plaintiff, to prove that his horses were seized for trespass upon any part of the land covered by the latter lease, we are of the opinion that, so far as his claim depends upon the reservation referred to, in said lease, it must fall to the ground.

And if it can be considered that the line of argument set up by the defendant, waived the necessity of proving this, still we are of the opinion that the plaintiff's claim cannot stand upon the narrow basis of the reservation in the lease, for the clause

which we have quoted cannot fairly be construed to be any thing more than simply a reservation of the rights belonging by law to the hoainas living under the konohiki, on the 16th of February, 1853. We regard the clause therefore as of very little practical importance, inasmuch as those rights would, as it seems to us, have been equally well preserved without such a clause ; and it was not in the power of the konohiki, had he been so disposed, to alienate a single right secured by law to the plaintiff.

But the claim of a right of pasturage, put forward by the plaintiff, is made to rest upon far broader grounds than that just mentioned, which fact renders this case one of great importance, not only to the large landed proprietors throughout the Kingdom, but to thousands of the common people. It is contended on behalf of the plaintiff that he, as a hoaina of Honouliuli, has a right to pasture his animals on the kula land of that ahupuaa, upon one or both of two grounds ; first, by custom ; or secondly, by statute law.

It appears by the evidence that horses were first introduced on the ahupuaa of Honouliuli about the year 1833 ; that within ten years afterwards they had become numerous ; and that the horses belonging to the hoainas were allowed to pasture upon the kula land, in common with those of the konohiki. It appears further that, about the year 1851, after the enactment of the new laws, relating to the tenure of land, a large number of the hoainas of Honouliuli, including, as we understand, Mr. Haalelea's testimony, some who had obtained awards for their kuleanas, and others who had not, came to Mr. Haalelea, the konohiki, and expressing their understanding and belief that under the new order of things they would be cut off from the enjoyment of some of their accustomed rights and privileges, including the right or privilege of pasturage, they offered to continue to labor for him, as formerly, upon the konohiki's labor days, in consideration of his allowing them to enjoy all their accustomed rights and privileges, to which proposition he agreed ; that since that time all the hoainas who have duly performed their labor on the konohiki's days, have been permitted to pasture their horses on the kula land as formerly ; and that the plaintiff is one of those who have

continued to labor according to that agreement. It appears, also, that within the three years last past the defendant has repeatedly notified the hoainas to remove their horses from the kula lands leased by him.

Upon this state of facts, it is argued by the learned counsel for the plaintiff, that he, in common with the other hoainas of Honouliuli, is entitled to the right of pasturage, by custom. On the other hand, it is contended, on the part of the defendant, that before the Court can sustain this claim on the ground of custom, the custom attempted to be set up must appear to have existed from time immemorial; to be reasonable, to be certain, and not inconsistent with the laws of the land.

While we are of the opinion that the objection urged by the counsel for the defendant against the custom sought to be set up by the plaintiff, that it is not shown to have obtained from time immemorial, is entitled to great weight, we do not think it necessary to express a conclusive opinion upon that point at present. For it is obvious to us that the custom contended for is so unreasonable, so uncertain, and so repugnant to the spirit of the present laws, that it ought not to be sustained by judicial authority. Further, it is perfectly clear that, if the plaintiff is a hoaina, holding his land by virtue of a fee simple award from the Land Commission, he has no pretense for claiming a right of pasturage by *custom*, for so far as that right ever was customary, it was annexed to the holding of land by a far different tenure from that by which he now holds—a tenure by which the hoaina was bound to labor a certain number of days in each month, for the immediate lord of the land, and a like number of days for the King or Government, as payment or rent, both for the use of the land and for the enjoyment of the other rights and privileges appurtenant thereto, whereas the very fact that the plaintiff holds his land by virtue of a fee simple title, frees him forever from the labor formerly due to the Government and to the konohiki; he no longer owes, nor can he be called upon to perform such labor, by law, as payment for the use of his land, or for the enjoyment of any right or privilege, and if he performs such labor it is neither by force of law or custom, but in fulfillment of a private contract. Again, if the

plaintiff claims to be a hoaina of Honouliuli, holding his land, not independently, upon an award from the Land Commission, but according to ancient tenure, in dependence upon the konohiki, and that, therefore he is entitled to the right of pasturage, by custom, he is met by the testimony of the principal witnesses introduced by himself, to the effect that, in the year 1851, he, in common with the other hoainas of Honouliuli, admitted that his former right or privilege of pasturage was determined, by the operation of the new laws affecting the tenure of land, and that he has since been permitted to enjoy the right of pasturage for his horses, not by force of law or custom, but in consideration of certain labor which he has performed, in accordance with a special contract with the konohiki, to that effect, made at a time when the right of pasturage could not have been said, with any show of reason, to have become established by ancient custom. And whatever private agreement as to pasturage may have existed between the plaintiff and the konohiki, that, of course, cannot affect the defendant's rights under his leases, unless he had special notice of such agreement, and bound himself to respect its terms.

Let us now pass on to the examination of the principal ground upon which the right of pasturage is claimed by the plaintiff, viz : by statute law. The law referred to is the "joint resolutions on the subject of rights in lands, and the leasing, purchasing and dividing of the same," passed on the 7th day of November, 1846 ; which it is contended, and rightly so, have never been expressly repealed by the Legislature. The plaintiff relies, more particularly, upon a part of the first of those resolutions, which reads as follows, viz ; "The rights of the hoaina in the land consist of his own taro patches, and all other places which he himself cultivates for his own use ; and if he wish to extend his cultivation on unoccupied parts, he has the right to do so. He has, also, rights in the grass land, if there be any under his care, and he may take grass for his own use or for sale, and may also take fuel and timber from the mountains for himself. He may also pasture his horse and cow and other animals on the land, but not in such numbers as to prevent the konohiki from pasturing his. He cannot make

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agreement with others for the pasturage of their animals without the consent of his konohiki, and the Minister of the Interior."

The declaratory enactment was passed by the Legislature at a time when the old system as to the tenure of lands was still in existence, and before the passage of new laws upon the subject of land titles, the operation of the Land Commission, and the great division of 1848, had brought about and perfected that entire revolution in the law affecting rights in land, and land titles, which has taken place since the year 1846. The character of the old system of tenure and the state of titles and interests in land, at the time of the passage of the joint resolutions of November, 1846, may readily be gathered from those resolutions themselves, and from the fundamental "Principles adopted by the Board of Commissioners to quiet land titles, in their adjudication of claims presented to them," to be found on pages 81 to 94 inclusive, of the 2d vol. Statute Laws. While it is true that the Joint Resolutions referred to have never been expressly repealed, we think there can be no doubt that, at least those of them which are merely declaratory of the law relating to rights in land, have all been impliedly annulled and superseded by other enactments upon the same subject.

In order to ascertain and declare what is now the law upon that subject, it is necessary to examine and consider together the several enactments *in pari materia*, which are to be found standing upon the statute book. The Joint Resolutions of November, 1846, were not only declaratory of the rights in land, possessed in common at that time, by the Government, the konohiki, and the hoaaia, but were also, in part, directory as to the mode of leasing, purchasing and dividing of lands, having due regard to the common rights of these several parties. So far as these resolutions provided for a division of land, their provisions have been entirely superseded by other and more expeditious arrangements; for, while the great division of 1848 separated and defined the land of the King and Government, and that of each konohiki, the action of the Land Commission separated and defined the land of every hoaaia who succeeded in sustaining a claim before the Board.

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It was evidently the intention of the Legislature that whenever, in any case, a tract of land was divided between the several parties in interest, those rights which they had previously held in common, while their interests in the land were undivided, should cease to be so held. The fourth Joint Resolution provides that, "If any man wish to obtain an allodial title to the land which he has himself cultivated," he should have the right to petition the Minister of the Interior for the purchase of such land, and if the land was sold and patented, the price obtained therefor was to be divided equally between the Government and the konohiki. The fifth Joint Resolution reads as follows: "Whenever any individual secures an allodial title to his cultivated grounds, as specified above, and the *pasture ground* and uncultivated parts remain, then that remainder shall belong equally to Government and to the konohiki." The seventh Joint Resolution provides that, "If any konohiki wish to have his portion of any given ili or ahupuaa set off to him according to his rights in the same, that he may procure an allodial title therefor, he may petition the Minister of the Interior, on stamped paper, who shall have power, with the approbation of his Majesty in Privy Council, to complete the arrangements for the same, after which there shall be given to the konohiki a patent for the same." Can it be claimed that, after a division of the land between the several parties, in conformity with the provisions just quoted, the hoaina still had the right to "pasture his horse and cow and other animals on the land" of the konohiki, to an indefinite extent? We think not. It might with equal propriety be contended that he still had the right "to extend his cultivation on unoccupied parts" of the konohiki's land, without his consent. We are much strengthened in this view of the case by the reading of the Act passed on the 6th day of August, 1850, confirming certain resolutions passed by the King in Privy Council on the 21st day of December, 1849, granting fee simple titles, free of commutation, to native tenants (or hoainas) for their cultivated lands and house lots, and also protecting the hoainas in the enjoyment of certain rights therein enumerated, as against the sweeping operation of the konohiki's allodial titles. The third section of that Act empowered the Land Commission to grant

fee simple awards, and to define and separate the portions of land belonging to different individuals, so that *each man's land should be by itself*. The sixth section reads as follows: "In granting to the people their cultivated grounds, or kalo lands, they shall only be entitled to what they have really cultivated, and which lie in the form of cultivated lands; and not such as the people may have cultivated in different spots, with the seeming intention of enlarging their lots, *nor shall they be entitled to the waste lands.*"

Upon a careful examination of the Joint Resolutions of November, 1846, and the Act of the 6th of August, 1850, we find that several of the provisions of the latter are clearly inconsistent with those of the former, and we are of the opinion that, so far as this is true, the provisions of 1846 must be held, by necessary implication, to be repealed by those of 1850. The first, as we have already intimated, were passed while the old system of land tenure was still in full force, and the rights of the different parties interested in the land were as yet undivided; the last were passed at a time when the entire change of system, which has taken place since 1846, was in full progress, and had already, to a great extent, been achieved. We think the following language, held by the Master of the Rolls, in the case of the Dean of Ely *vs.* Bliss, applies here: "If two inconsistent acts be passed at different times, the last is to be obeyed, and if obedience cannot be observed without derogating from the first, it is the first which must give way. Every Act of Parliament must be considered with reference to the state of the law subsisting when it came into operation, and when it is to be applied; it cannot otherwise be rationally construed. Every act is made, either for the purpose of making a change in the law, or for the purpose of better declaring the law." So, also, the following dictum of Lord Denman, in the case of Reg. *vs.* Inhabitants of St. Edmund's Salisbury: "While we hold that a positive enactment is not to be restrained by inference, we must also act on the maxim, *leges posteriores priores contrarias abrogant*, whenever it comes in operation." (See Dwarris on Statutes, p. 531.) Upon this ground, we must hold that the first Joint Resolution, of November, 1846, has been abrogated, and that the enumeration therein contained, of cer-

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tain specific rights of the hoaina, apart from his right to the land he cultivated, has been superseded by the specification of the same rights, contained in the seventh section of the Act of August, 1850, which specification reads as follows, viz : "When the landlords have taken allodial titles to their lands, the people on each of their lands shall not be deprived of the right to take firewood, house timber, aho cord, thatch, or ti leaf, from the land on which they live, for their own private use, should they need them, but they shall not have a right to take such articles to sell for profit. They shall also inform the landlord or his agent, and proceed with his consent. The people shall also have a right to drinking water, and running water, and the right of way."

That it was the intention of the Legislature to declare, in this enactment, *all* the specific rights of the hoaina, (excepting fishing rights,) which should be held to prevail against the fee simple title of the konohiki, we have no doubt. We think this is conclusively shown by the fact that the Legislature, at its next session, in 1851, had its attention renewedly directed to this subject, on which occasion it revised and partially amended the section just quoted, by an Act which commences with the following preamble, viz : "Whereas, many difficulties and complaints have arisen from the bad feeling existing on account of the konohikis forbidding the tenants on the lands enjoying the benefits that have been by law given them : Therefore," etc. It was evidently the intention of the Legislature at the time of the passage of the Act of 1850, that the former right of the hoaina to "pasture his horse and cow, and other animals, on the land, but not in such numbers as to prevent the konohiki from pasturing his," should cease to exist. It was inconsistent with the new system, and was therefore not preserved on the change of the law. That such was the general understanding throughout the country, after the passage of the Act of 1850, clearly appears from the evidence given in this case ; and it is matter of history that during several subsequent sessions of the Legislature, petitions were presented for the enactment of a law granting to the common people the right of pasturage on the lands of the konohikis, but without success, on the ground that it would interfere with vested rights. We understand

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the latest enumeration, by the Legislature, of the specific rights of the hoaina, to be restrictive as against the rights of the konohiki and the Government, and we think, therefore, that the maxim *expressio unius est exclusio alterius* (Dwarris on Statutes, p. 605) must be held to apply in this case, with conclusive force; and that, too, without any distinction as to whether the plaintiff is a kuleana holder, or otherwise; our understanding of the term *people*, as used in the seventh section of the Act of 1850, being that it is synonymous with the term *tenants*, as used in the law relating to private fisheries, of which we expressed our view in the recent case of *Haalelea vs. Montgomery*.

Let judgment be entered for the defendant, with costs.

C. C. Harris, Esq., for plaintiff.

A. B. Bates, Esq., for defendant.

October, 1858. .

SUPREME COURT.—HABEAS CORPUS.

IN THE MATTER OF FRANCIS DE FLANCHET OR FRANCHET, A PRISONER IN THE FORT.

A French seaman, one of the crew of a French ship, wrecked in the Arctic Ocean, was taken on board of an American whaleship, brought to the port of Honolulu, and was here shipped before the American Consul as boat-steerer on board the same vessel, and subsequently arrested by order of the American Consul as a deserter from the said vessel: Upon the petition of the Commissioner of France, he was brought before the Court on a writ of habeas corpus, claimed as a French subject, and alleged to be legally incapable, under the laws of France, of entering into the contract.

Held, that the mariner's relation to the vessel was dissolved *de facto* and by operation of law, when the master abandoned his ship as a hopeless wreck, and that the mariner was at liberty to enter into a new contract of shipment on board the American vessel.

Also, that the laws of France, admitting the seaman to be liable for a penalty under them for having enlisted on a foreign ship, can not have force to control the sovereignty or rights of any other nation within its own jurisdiction.

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Municipal laws must always be restricted in their construction to places and persons upon whom the Legislature have authority and jurisdiction.

Penal laws are strictly local, but a different rule obtains in relation to contracts.

ALLEN, C. J.

This was a writ of habeas corpus to the Marshal of the Hawaiian Islands, commanding him to bring before the Court the body of Francis de Flanchet. This writ was issued on the petition of Emile Perrin, Consul of the Empire of France, at the Hawaiian Islands, who on oath alleges that said Flanchet, a French subject, and sailor lately serving on board the French whaleship "Napoleon III.," which was wrecked in the Arctic Ocean on the 20th day of May last, has been arrested and committed to prison, where he still remains, by the Police authorities, for the alleged offense of deserting from an American whaleship in the harbor of Honolulu, and that he is informed and believes that the said allegation is without foundation in fact, inasmuch as the said Flanchet never entered into any legal contract to serve on board said ship, and is not a deserter therefrom, and that the arrest and imprisonment of said Flanchet are illegal and unjustifiable in law; that said petitioner, as such Consul, is the legal and only guardian of the rights and liberties of the said Flanchet, who is a native born French subject.

And the Marshal makes return on said writ as follows:

"By virtue of the within writ of *habeas corpus*, as Marshal of the Hawaiian Islands, I now bring the body of Francis de Flanchet or Franchet into Court."

"I make further return that I do not know whether he is a French sailor or not, and that he was arrested on the 30th day of October, A. D. 1858, and is now detained in the Prison under my custody by virtue of a warrant of arrest now in my hands, issued by Abner Pratt, United States Consul, residing at Honolulu, of which the following is a copy:

' Consulate of the United States of America, }
Honolulu, S. I., October 30, 1858. }

SIR:—Francis Franchet, of the crew of the American ship "Nassau," whereof H. Murdock is master, now in this harbor, has deserted in an improper and insubordinate manner, I would

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request you to cause the said person to be arrested and imprisoned until I find it expedient to give him liberty.

(Signed,)

ABNER PRATT.

To W. C. Parke, Marshal of the Hawaiian Islands.'

"Being authorized and required so to do by the treaty of friendship, commerce and navigation between his Hawaiian Majesty and the United States, concluded and signed at Washington on the 20th day of December, 1849, and the Statute Laws of this Kingdom, defining my duties as Marshal, and I do hereby return this order complied with, this 5th day of November, 1858.

(Signed,)

W. C. PARKE, Marshal H. I."

The writ of *habeas corpus* is a summary process. It requires the exercise of a sound discretion and a careful examination into all the circumstances of the case, which in this instance involves questions of great importance. The whole case has been very ably presented by the learned counsel to the consideration of the Court.

The petitioner's counsel contends that de Flanchet never entered into any legal contract to serve on board said ship "Nassau," and therefore could not be a deserter.

It is alleged that as the seaman did not read in detail the shipping articles, he could not have understood the contract, and therefore it is void. It is well known that these shipping articles are in perfect coincidence with the laws of the United States, and with the general principles of the maritime law, and there was no more need of his reading these articles any further than the terms of the contract were embodied, than there was of his reading the laws of the country applicable to the shipping contract under whose flag he proposed to sail. For when any stipulation is found in the shipping articles inconsistent with its provisions, unless it was clearly explained to the seaman, and agreed to by him for a consideration, it is void. He had been on board the ship five months, and had during this period become conversant with the rules and regulations and police of the ship—the material questions for him to settle were his compensation or lay, and the term of service. The evidence of the Clerk of the Consulate is, that these were clearly and distinctly understood by him. He expressly swears

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that he explained to him the terms of shipment. The lay was expressly stated, and the term of service, and the seaman was present when his name was entered on the shipping articles in accordance with the law of the United States. All countries especially enjoin it as a consular duty to guard the seaman and protect him in his contracts and his rights. They are accustomed to consider seamen as peculiarly entitled to their care and protection. From the whole evidence I am satisfied that the seaman fully understood the conditions of the contract and agreed to them.

By the testimony of the master of the ship, it appears that there had been a conversation on the passage from the North, through the interpretation of Mr. Malee, the 2d officer of the "Napoleon III.," that Flanchet would ship on his arrival in Honolulu at the 75th lay. He says that he made a bargain with the seaman, which was interpreted by Mr. Malee, and that the seaman gave his assent to it, and that in pursuance of that agreement he immediately went into the Consul's office with him, and he was then shipped in the manner as stated by Mr. Marshall.

De Flanchet says that when Capt. Murdock took him on board he agreed to pay him the same as he paid the others; that there was an officer on board named Malee who interpreted to him what the Captain said. He says that he thought that when Capt. Murdock took him to the Consulate it was to pay him, but he received nothing; did not understand what they said at the Consulate, but knew on going out that he was shipped; he then went on board the ship, and soon after came on shore and went to the French Consul's to tell him that he had been shipped, but that he had not been paid for the oil. He says further that he never made an arrangement with the Captain, Mr. Malee made it; that witness never spoke to the Captain about any arrangement. Mr. Malee told witness before he went up stairs at the Consulate that he was to ship, and he said let them pay me for the oil already taken first, and then he would see about it. When in the office was asked his age, and he answered twenty-one. He further says that he told Mr. Davis, at the Prison, that he could not go in the American vessel, that the French laws forbid it, but if he was free would like to go.

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If on going out of the office he discovered that he was shipped without his knowledge, why did he not return immediately and correct the error, which the Consul would have done at once, on discovering that the man was shipped from a misunderstanding, and especially in cases where the seaman understands very little of the language. He says Malee told him when he was going to the Consulate he was to ship. So, it is very certain that when he went to the office the idea of shipping was on his mind, and that being the case, had he been disinclined to make the contract he would not have done anything about it. I cannot believe that Mr. Marshall was mistaken. It is very certain that it was a subsequent thought, after it was said to him that he incurred a penalty by the laws of France by shipping in a foreign vessel, for he told Mr. Davis that if he was free he should like to go on board the "Nassau." It is manifest that the subject of shipping on his arrival in Honolulu was familiar to his mind, and that Malee explained to him fully the terms of shipment before he went into the office of the Consul, and that while there the contract was clearly and fully explained to him.

Is it a reasonable bargain? The seaman gets the 75th lay as a boatsteerer, and that portion of the oil now on board of the ship as well as the future catchings. I regard this an equitable bargain, although it is not contended that the Master of the ship was under any legal obligation to pay him that proportion if he left the ship here. It is very clear that there was no disposition to drive a hard bargain. Had there been, I should have regarded the contract as liable to objection. But I am fully convinced that it is a favorable contract for the seaman, and that he fully understood it. The shipping articles are in the usual form, and regarded favorably by all parties. There is no condition but what is for the benefit of the seaman to regard, and could they be rigidly enforced, it would promote the health of the seaman and the success of the voyage. In addition, this seaman had been on board this ship for some five months; he had become acquainted with the rules and regulations of the ship; and what would be required of him on board, and had he not been willing to ship when, as he says, he thought they were shipping him, he would have declined to have discussed the terms and to have answered the necessary questions

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for entry on the ship's papers, for it appears that the lay, or share, and the term of service were distinctly stated. His measure was taken, his age was asked and given, and his nationality, all which were properly entered on the shipping articles and crew list. Who can doubt then that he understood it? It is very easy for a seaman to understand his lay, and whether a voyage was for a season or till the ship went home. It is equally clear that he subsequently changed his mind—men very often, and very improperly, do this after they have made a contract. In view of all the evidence, I am satisfied he was legally shipped on board the "Nassau."

It is contended further that although he was legally shipped, he was not a deserter, and therefore ought to be discharged. The prisoner says that immediately after he left the Consul's office that he went on board and immediately returned on shore again and went to the French Consul's. He says he went to tell the French Consul that the Captain had shipped him. He says he applied to the Consul for clothes, which he gave him, and he further applied to the Consul to procure his clothes from the "Nassau," and two of his companions went on board to get his clothes, but the Captain refused to deliver them. The French Consul provided him with lodgings, where he remained one and a half days before he was arrested. He says "the French Consul visited me in prison—but he did not forbid me to go on board the ship 'Nassau,' but I know that the laws of France forbid me to go on board that vessel." He says further, that the Captain of the "Nassau" offered him \$100. Mr. Davis testified that he had a conversation with the prisoner, and he said he could not go, as it was against the laws of France. He said it would subject him to thirty two months imprisonment. He said the Consul of the United States wished him to visit the prisoner and ascertain whether he wished to go in the vessel. The Captain of the "Nassau" asked the prisoner if he would like to go on his vessel if he were free, and he said yes, but said the French Consul told him that he must go on board a French whaler outside, or a man-of-war.

Let us examine the circumstances, and see if they do not evince a deliberate intention to desert. He left the ship and

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went to the French Consul's and took the lodgings that he furnished, where he remained one and a half days. Sent to the "Nassau" for his clothes, but they were not delivered. He, in a conversation with the Captain of the "Nassau" and Davis, said that he could not go on board because it was against the laws of France. If he was free he would like to go. Mr. Davis went, at the special request of the United States Consul, to ascertain from the prisoner whether he wished to go in the vessel, and he said no, giving the same reason.

There is no evidence of the circumstances of his leaving the ship, whether he had permission or not, but he was absent one day and a half before his arrest.

When it is clear, as in this case, that the seaman did not intend to return to the vessel, and having actually not returned, he was in contemplation of law a deserter. The Captain requests his return to the vessel and he declines; the Consul wishes to know if he will join the ship and he declines. He uses the same language to Mr. Davis, although this was subsequent to his arrest, still it carries the same intention, which it evinced in all his conduct on his coming on shore. Had the evidence been that he was willing to return to the ship and never declined to join her, he would clearly be entitled to his discharge. But the evidence clearly shows that he either went on shore with the intention not to return to *the ship*, or he decided upon this course soon after.

The statute of 1840, chap. 23, makes it the duty of Consuls and Commercial Agents of the United States "to reclaim deserters and discountenance insubordination by every means within their power; and where the local authorities can be usefully employed for that purpose, to lend their aid and use their exertions to that end in the most effectual manner. In all cases where deserters are apprehended, the Consul or Commercial Agent shall inquire into the facts."

It appears that the Consul did inquire into the facts, and ascertained that he would not return to the vessel, and for a reason which operated on his mind before arrest, and that was, an apprehension that he would be punished by the laws of France for joining a foreign ship.

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It is further contended that although the prisoner has made a valid contract, and has deserted, that there is no legal warrant for his arrest and detention.

By the law of 1846 it was made the duty of the Prefect of Police to make diligent search for deserters from foreign vessels, and arrest them, due notice being given him, and if not returned to his vessel, shall be put at the disposal of his proper Consul, or Commercial Agent. And at this time there was no provision made for an especial mode or process of arrest, as the Prefect relied upon the Consul to inquire into the facts of the case, and see that justice was done. In 1847 the office of Marshal was created, and he became, *ex officio*, Prefect of Police.

In 1849 this Government made a treaty with the United States, in which it was stipulated "that the Consuls, Vice-Consuls, and Commercial Agents, are authorized to require the assistance of the local authorities for the search, arrest, detention and imprisonment of the deserters from the ships of war and merchant vessels of their country. For this purpose they shall apply to the competent tribunals, judges and officers, and shall, in writing, demand the said deserters, proving by the exhibition of the registers of the vessels, the rolls of the crews, or by other official documents, that such individuals formed part of the crews, and this reclamation being thus substantiated, the surrender shall not be refused."

It appears by this stipulation that the Consul shall apply to the competent tribunals, judges and officers, and shall, in writing, demand said deserters. In this case the Consul has done his duty by applying to an officer competent to make the arrest. Upon this application the Marshal makes the arrest in accordance with the usage which has always prevailed in this Kingdom.

It is undoubtedly within the discretion of either of the parties to the treaty to prescribe the tribunal or officer to which the Consul shall, in writing, address his demand for the deserter—but as this has not been done, he has pursued the usual course, and addressed his note to the Marshal. Suppose a tribunal was especially instituted, the Consul would be under no obligation to make oath to the facts on which a warrant should issue.

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The magistrate must issue his warrant on this communication, which is not an affidavit upon which warrants are usually issued. The present mode is certainly much more convenient, and it is not contended that it is illegal unless made so by the 13th Article of the Constitution, which is in these words :

“Every person has the right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and effects, and no warrants shall issue, but on probable cause, supported by oath or affirmation, and describing the place to be searched, and the person or thing to be seized.”

Regarding the terms of the treaty, no warrant based on an affidavit could be issued, for the Consul is authorized, in writing, to make a demand for the deserter, but an oath by him is not required.

Every person has a right to be secure from all unwarrantable seizures by the laws of the Kingdom, and our treaty stipulations regard the arrest of a deserter from a foreign ship as a duty and not as an unreasonable seizure. The law of 1846 was enacted, and the treaty stipulation was made prior to the Constitution, and as another of the same purport was passed in 1853, it is very clear that it was the intention of the framers of the Constitution to apply this peculiar mode of arrest and none other to persons attached to foreign ships. In addition, in the same year, a law was passed making it lawful for the Marshal so to arrest mutinous persons on board of any vessel of this nation, being within the jurisdiction of this Kingdom, upon written application made to the Marshal by any foreign Consul, Vice Consul or Commercial Agent.

In their legal condition seamen attached to foreign ships are differently situated from other persons. They are subject to the laws of the country from which they derive their flag, as well as liable for any violation of the local laws. They have their first examinations by the laws of their own country, which make it the duty of their Consuls in all cases where deserters are apprehended to inquire into the facts. Here is the first investigation by the Consul of the nation under whose flag he sails, and so far as the liberty of the person is concerned it may be regarded as a matter of universal law, as effective in protecting personal liberty, as the mode contended for by the

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Consul. In addition, the writ of habeas corpus is still open to him; it will be seen, therefore, that the seaman is as fully shielded from any encroachment on his personal liberty as the people of the country, wherever he may be. The arrest is made on the declaration of the Consul that the person is a deserter, proving by the exhibition of the register of the vessel, the rolls of the crew, and other official documents, that he formed part of the crew. The officer has a right to demand of the Consul the inspection of these documents, but if he does not, it don't vitiate the arrest. The design of this provision is to protect the officer, and should he arrest a person wrongfully who was not legally attached to a ship, he would be liable in damages.

It is further contended that by the parity clause of the French and Hawaiian treaty of 1846, that all the privileges that are given to natives of this Kingdom are claimed by the French Consul, and he claims to stand in the same relation towards French subjects on these islands, as the Governor does to natives, and that they cannot be enlisted without his authority; and that, therefore, the prisoner not having such authority, was not competent to make a valid and binding contract to serve on board the "Nassau," and claims his discharge by the tribunals under this treaty stipulation.

It is certainly the right and privilege of the subjects of the Empire of France to consult with the Consul of their nation in relation to the expediency of shipping, but was it intended to extend to him the power to control the subject in this particular as the Hawaiian laws do the natives? Is it a *civil right* that the subject has that the Consul shall control him? Is it a privilege? The parity clause in treaties has reference to favors, privileges and immunities. It would be a singular construction of language under the parity clause of privilege to impose on the subjects of foreign nations, temporarily here, the restraints, the burthens and taxes, to which native subjects are subjected. The native subject is liable for taxes, and is obliged to procure the approbation of the Governor before he can be permitted to ship on any foreign vessel, or before he

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can leave the country. This provision of the law, however, does not apply to the naturalized foreigner—it is limited to the native.

By the argument of the learned counsel, these are privileges, and the French subject should *enjoy* them. It may be that the French Consul would like to enjoy the privilege of controlling French subjects to this extent, in this particular—but they would hardly regard it as a civil *right* or privilege to be obliged to obtain the permission of their Consul to make a contract as seamen. The parity clause in treaties is frequently subjected to ingenious application, but usually in favor of extending the rights and privileges of foreign subjects. But the practical application as contended for would not only transfer the protection of the subject under the laws of this Kingdom to the Consul, but also empower the Consul to restrain the subject in the civil right of making a contract, and all this under the parity clause of right and privileges. It would invest the Consuls of the different countries with a power over the citizens and subjects of their countries which they represent, which has never been exercised or claimed by any nation. It would be an exercise of legal tyranny not contemplated by the framers of the treaty. The Hawaiian Legislature would be somewhat amazed to learn that in passing restrictive laws on native subjects, such for example as prohibiting the sale of liquors to natives, that this would be claimed by foreigners as one of the rights and privileges to which they were entitled.

Chancellor Kent says that treaties of commerce defining the rights and extent of commercial intercourse, have been found to be of great utility, and they occupy a very important title in the Code of National Law. They have multiplied exceedingly within the last century, but during this period no such claim by Consuls has ever been instituted over the subjects of a foreign country resident abroad.

By the French law, every Frenchman is free to abdicate his country. If they accept foreign citizenship, or enter into foreign service without leave, it evinces an intention never to return, and thereby they lose all their civil and political rights at home. They lose thereby their nationality, or civil and political rights as Frenchmen. Hence, by the French law the per-

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fect freedom to emigrate and seek their own fortunes in their own way, if in accordance with the laws of the country where they are. The construction placed on the parity clause, therefore, is not in accordance with the perfect freedom of the French law, applicable to the subject abroad. In the case of the *U. S. vs. Wingall*, 5 Hill, N. Y. Reports, 16, it was held to be lawful to enlist aliens in the army of the United States, and the contract would be valid. There can be no doubt of the general principle of law, that any man has a right, who lands on these shores, to make a contract to serve on board of a vessel of any nation, so far as the law of the place is concerned, and that contract fairly and properly made is obligatory on the parties, unless the seaman makes it in derogation of a prior contract. By treaty stipulation deserters must be arrested and delivered up to the ship to which they are legally attached, and when a seaman has fraudulently shipped on board more than one vessel, the first in time would be the first in right.

It is contended further, by the learned counsel for the petitioner, that by the Marine Laws of France, 25th October, 1795: All sailors are subject to an inscription, and bound to serve on board national vessels, or in the national docks whenever required so to do. And by another article of March, 1852, any French sailor subject to the maritime inscription found on board of a foreign vessel, unless he have a permit from a French authority, or prove that his being on board was the result of circumstances beyond his control, shall be punished as therein provided.

The counsel further claims that, under this inscription, the prisoner's services are due to the Empire of France, and that he is incompetent to contract to serve on board any foreign vessel without the permit required by the 67th Article of the said law of 1852, and that therefore the alleged contract with the "Nassau" is void, and therefore the prisoner must be discharged.

That, by the comity of nations, the above law of France not being repugnant to, or at variance with, the laws of this Kingdom, is to be respected here.

It is not denied that the original contract by which de Flanchet was bound to the "Napoleon III.," was dissolved after the wreck was abandoned. The mariner's relation to the vessel is

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dissolved *de facto*, and by operation of law, when the Master has abandoned the vessel, and authorized the crew to leave her. Hence it is, that persons having been attached to a ship which has been wrecked, and abandoned from necessity, may claim, as salvors, when their services exceed the proper duty as seamen, and when their connection with the ship in the capacity in which they shipped had been *de facto*, and by operation of law, dissolved. (The two "Catherines," 2 Mason, p. 319; The "Neptune," 1 Hogg Ad., 227, 237; Mason and Blenreau, 2 Cranch R., 240; Hobart *vs.* Dragon, 10 Peters Rep., 108, 122.)

It is very clear also that he joined the ship "Nassau" in the Arctic Ocean, after the wreck of the "Napoleon III.," from circumstances beyond his control.

There is no doubt that he could have legally left her on arrival in port, but he thought proper to complete a contract for the voyage, which had been somewhat discussed during the season, and thereby obtain his full proportion of the earnings of the ship while he was on board. How far the seaman would be answerable in France for joining a foreign ship under circumstances beyond his control, and continuing in her service under a contract which may be regarded as especially favorable to his interest, I will not attempt to give an opinion; but certain I am that the penalty could only be nominal. But admit him to be liable in France to a penalty under her laws, he is certainly not liable here by virtue of those laws. A penal law is strictly local, and can not have any operation beyond the jurisdiction of the country where it was enacted. The petitioner cannot expect this Court to enforce the criminal laws of another country, or aid in surrendering those who are accused of having violated those laws farther than is prescribed by international law, or required by the obligations of treaty. Lord Loughborough says "that the penal laws of foreign countries are strictly local, and affect nothing more than they can reach, and can be seized by virtue of their authority; a fugitive who passes hither comes with all his transitory rights, and cannot be affected in this country by proceedings against him in that which he has left, beyond the limits of which such proceedings do not extend." (1 H. Bl., 135.)

The laws of a nation cannot have force to control the sover-

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eighty or rights of any other nation within its own jurisdiction. And however general and comprehensive the phrases used in the municipal laws may be, they must always be restricted in construction, to places and persons upon whom the Legislature have authority and jurisdiction. (The "Apollon," 88. 6 Curtis, U. S. Reports.)

This is a principle of law recognized in the jurisprudence of France, I am quite sure, as well as throughout the rest of the civilized world.

A different rule obtains in relation to contracts. Justice is to be administered in our Courts according to our laws and forms of proceeding, though the action be founded on a contract made in another State or country, the *lex loci* applying only to the construction and effect of the contract. Every country has its own modes of redress and judicial proceedings peculiar to its own jurisprudence. The *lex loci* has reference to the nature and construction of the contract, and its legal effect, and not to the mode of enforcing it. Justice demanded that this comity should exist between nations, and it has become incorporated into the Code of National Law in all civilized countries. (14 Johnson's Rep., Cowp., 343; 1 Johnson's Cases, p. 140; 1 Gallison's Rep., 371.)

What was the legal condition of Flanchet when he arrived within the limits of this Kingdom in the ship "Nassau?" If he was under no legal obligation to remain on board of her and do his duty—and his contract with the "Napoleon III," having been dissolved by operation of law, he was a free man, amenable to the laws of this Kingdom, while here, and entitled to the privileges which those laws confer. It must be admitted, from the authorities to which I referred, that the penal laws of France are inoperative here, and it does not come within the rule of the comity of nations to give them force here, for this very course might make us the instruments of doing injustice to others. We are bound to conform to the code of the civilized world, and to our treaty stipulations, which I trust will never do violence to it. And now, what would be the practical working of this application of the Consul of France? It certainly would be to control the liberty of this man on the ground that he had been attached to the French marine, although he

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now is a seaman attached to a foreign ship, and he virtually claims the interposition of our laws to aid him. By treaty, this Government is bound to render all necessary assistance for the search, arrest, detention and imprisonment of deserters from ships of war and merchant ships. The Consul of France does not claim him as a deserter, and therefore we are not called upon to aid him under this provision.

The only remaining treaty stipulation which has reference to the surrender of any person to the authorities of another country, applies to those who, being charged with the crimes of murder, piracy, arson, robbery, forgery, or the utterance of forged paper, committed within their jurisdiction, shall be found within the limits of this Kingdom. De Flanchet is not demanded under this stipulation. So scrupulously have all countries guarded the personal liberty of those within their territory that it is the doctrine generally recognized among nations that, independent of treaty stipulations, no State is bound to deliver up fugitives from justice even upon the demand of a foreign State. Grotius entertained a different opinion, although he says that for some ages past the right of demanding delinquents has not been insisted on in most parts of Europe, except in crimes against the State, or those of a very heinous nature. Puffendorf founds the right of demanding a delivery of the offender on treaty stipulations. Lord Coke in his institutes is strong and positive against delivering up. He refers to a case in which Queen Elizabeth, in the thirty-fourth year of her reign, demanded of the French King, Henry the IV., Morgan and others of her subjects who had committed treason against her. The answer of the King was, "That all Kingdoms were free to fugitives, and it was the duty of Kings to defend every one in the liberties of his own Kingdom." There are other instances where the King of France has declined to surrender. If the practice and usage of States is to admit fugitives and defend them in their liberties, except in cases of special compact, it cannot be expected that we shall aid in surrendering a Frenchman who may have violated a penal law of his own country.

But in this case there are other difficulties and embarrassments than those which appertain to the rights of de Flanchet.

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He has made a contract on board the American ship "Nassau," and is legally bound to fulfill it. And it is very clearly a case in which an appeal to the comity of this nation cannot be made, for the reason that injustice would be done to the rights of the citizens of another friendly nation. Comity is never exercised in cases of this kind. Indeed, by the principles of international law, it is not to be exercised in doubtful cases, much less when it works injury to the State, its citizens, and especially to the rights of the citizens of a country with whom we have friendly relations. And, indeed, as in this case, with a country with whom we have treaty stipulations that we will render them all needful service in arresting deserters from their vessels. Wheaton says that "the delivering up by one State of deserters from the military or naval service of another, depends entirely upon the mutual comity, or upon special compact between different nations;" and this, although the deserter may have violated a law of vital interest to his State, and subjected himself to the penalty of death. I accord with the doctrine of Huberus, who says, "that by the comity of nations whatever laws are carried into execution within the limits of any State are considered as having the same effect everywhere, so far as they do not occasion a prejudice to the rights of other States and their citizens." This is the objection in this case, that the acquiescence in the view of the counsel for the petitioner would occasion a prejudice to the rights of a friendly nation and her citizens.

Wheaton says that a criminal sentence, pronounced under the municipal law in one State, can have no legal effect in another. It is a sentence of conviction, and it cannot be executed without the limits of the State in which it is pronounced upon the person or property of the offender, and if he is convicted of an infamous crime, attended with civil qualifications in his own country, such a sentence can have no legal effect in another independent State.

This doctrine is sustained by some eminent European writers, such as Martins, Klubec, and Felix.

It will not be contended, says Chief Justice Parke, that foreign judgments upon criminal suits can be executed upon the persons of such fugitives as may be found within our

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territory. No one supposes that they can be proceeded against and punished, either in their persons or property, in virtue of a judgment which may stand against them in the State from which they fled. (Commonwealth vs. Green, 17 Mass., p. 514.)

Flanchet was in the Kingdom, and legally shipped on board of an American vessel, and it is not a case to which an appeal to the comity of this nation can properly be made. It is not a question in which our citizens have the exclusive interest. If comity is to be exercised, it is to be by those directly interested in this particular case. It would be highly gratifying to the Court if the Consuls of the different nations represented here could arrange by comity any differences which may arise between them; but if they do not, and access is had to the Courts, our duty is to administer to them the law. We have treaty stipulations, and it is our duty to regard them; and to render aid in shielding a seaman from performing his contract would be a violation of our obligations to every nation, especially with whom we have treaties.

I am, accordingly, of opinion that the prisoner must be remanded.

October 12, 1858.

SUPREME COURT.—HABEAS CORPUS.

IN THE MATTER OF FRANCIS DE FLANCHET.

NOTWITHSTANDING that the 10th Article of the United States Treaty, regarding the arrest of deserters, is binding upon the Hawaiian authorities to make the arrest required, yet, if the party so arrested be brought up on *habeas corpus*, the Court is bound, so far as necessary, to go behind the declaration of the Consul, and inquire into facts of the case for the protection of the party arrested, in his legal rights.

Neither the statute law of 1846, nor the provisions of any of the treaties, require that a warrant should first be issued, upon oath, to validate the arrest of a deserter, upon the requisition of the Consul, unless the deserter were sheltered in a private house.

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On appeal from the decision of Chief Justice ALLEN, at Chambers.

Opinion of Justice ROBERTSON.

The facts of this case having been fully referred to in the lengthy and able decision rendered by the Chief Justice, at Chambers, and the circumstances of the case rendering it expedient that the final judgment should be given without delay, I will endeavor to state my opinion as briefly as possible.

The first question raised by the petitioner's counsel is a question of fact. He contends that the testimony in the case is not sufficient to prove a valid and binding contract of shipment between de Flanchet and the Master of the ship "Nassau." Upon this point I am satisfied, after a careful examination of all the evidence, that, at the time de Flanchet entered the U. S. Consulate with Captain Murdock, he did so with the intention of being shipped; that he voluntarily suffered himself to be enrolled on the articles of the "Nassau," in the manner which is usual in such cases; that he acted with a fair understanding of the nature and terms of the contract, and freely assented thereto.

The learned counsel, who appears on behalf of the Marshal, contends that the evidence touching the question of contract ought not to have been received, and that the Court is bound to regard the official statement of a foreign Consul, that a party is a deserter and liable to arrest, as entirely conclusive, and not open to be controverted. While I admit that the declaration of the Consul in such a case, accompanied by the exhibition of the proofs prescribed in the 10th Article of the U. S. Treaty, is so far binding upon the Hawaiian authorities as to render it imperative upon them to make the arrest required, I am of the opinion that the argument of the counsel goes too far, and that if a party so arrested feels himself aggrieved, and is brought up on habeas corpus, the Court is bound, so far as may be necessary, to go behind the declaration of the Consul, and inquire into the facts of the case, for the protection of the party arrested in his legal rights.

Upon the next point made by the petitioner, namely, that there is no proof that de Flanchet quitted the ship without leave, and with the intention not to return, and was therefore

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not liable to arrest as a deserter, I think it is proved beyond a doubt that, at the time the requisition was made by the U. S. Consul for the arrest of de Flanchet, he had fully determined not to return on board of his ship. As to what motive or consideration led him to form such a resolution, I think that is of no consequence here. That he had made up his mind to quit service on board of the "Nassau," in contravention of his agreement with Capt. Murdock, and that, in the language of maritime law, *animo derelinquendi*, seems to me manifest by his own statements, and I therefore consider him a deserter in the sense of the maritime law.

But it is contended by the petitioner that, under the operation of the second article of the treaty with France of 26th March, 1846, securing to French subjects in this Kingdom the same protection in regard to their civil rights, their persons and property, as is enjoyed by native Hawaiian subjects, de Flanchet could not be shipped here as a seaman without the consent of the Consul of France, because a native of this Kingdom, by a provision of Hawaiian law, cannot be shipped on board of a foreign vessel without the consent of the Governor of the island where the shipment takes place—I am clearly of opinion that the ground here taken by the learned counsel for petitioner is altogether untenable. That a port regulation of this Kingdom, made expressly to cover native seamen alone, and not in any way affecting the constitutional protection as to civil rights, person or property, guaranteed to Hawaiian subjects, should be considered in any way applicable to French subjects, by reason of the parity clause of the treaty referred to, although an ingenious proposition, appears to my mind utterly fallacious.

Upon the next point, which is based upon certain marine laws of France, and the respect to be paid to those laws within this Kingdom, by the comity of nations, I have merely to say that I entirely concur in the views of the Chief Justice, so elaborately set forth in his decision.

It is further argued on behalf of the petitioner, that de Flanchet is not held in custody by order of any competent judicial authority, not having been arrested in pursuance of any warrant, issued upon sworn application, according to the laws of this Kingdom. When the learned counsel says that the written

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requisition, addressed to the Marshal by Mr. Consul Pratt, is not a *warrant of arrest*, although it is so styled in the Marshal's return, and that no foreign Consul in this Kingdom has power to issue such a warrant, I think he is entirely right. And if it is necessary, in order to the arrest in every case of a deserter from an American ship, that the Marshal, or Sheriff, should first be provided with a warrant of arrest, issued upon sworn application, then de Flanchet was illegally arrested, and ought upon that ground to be discharged. But I am clearly of opinion that a deserting foreign seaman may, under our present laws, upon proper requisition made in accordance with the treaty stipulations, be arrested without a warrant, unless, perhaps, in the case of such deserter being sheltered in a private house, when it might be necessary formally to sue out a warrant of arrest, on the ground that in that case the rights of other parties would be involved. The arrest of a deserting foreign seaman, under ordinary circumstances, resembles, in my opinion, the arrest of a party in the act of committing a breach of the peace, or other offense, which may in general be made without a warrant. Neither the statute law of 1846, nor the provisions of any of our treaties, declare it to be necessary, to validate the arrest in such a case as the present, that a warrant should first be issued upon oath; nor do the restrictive provisions of the fiftieth chapter of the Penal Code, in relation to arrests, apply to this case.

For these reasons, and after a full examination of the matter, I am clearly of opinion that the decision of the Chief Justice ought to be affirmed.

Chief Justice Allen and Justice Ii concurred.

The motion for the discharge of de Flanchet was refused, and he was remanded into the custody of the Marshal, to be held in pursuance of the written requisition of the United States Consul.

Emile Perrin, in behalf Guillot Freres v. Oil on board Whaleship Hercules.

SUPREME COURT—IN ADMIRALTY.

EMILE PERRIN, CONSUL AND COMMISSIONER OF FRANCE, IN BEHALF OF GUILLOT FRERES, OWNERS OF THE FRENCH WHALESHIP "NAPOLEON III.," AND OTHERS, *vs.* A QUANTITY OF OIL ON BOARD WHALESHIP "HERCULES."

It is a general rule in the Admiralty, in cases of derelict, to allow a moiety of the property saved to the salvors.

ALLEN, C. J.

Emile Perrin, Consul and Commissioner of the Empire of France, at the Hawaiian Islands, in behalf of Messrs. Guillot Freres, owners of the French whaleship "Napoleon III.," lately wrecked in the Arctic Ocean, as well as of the underwriters of said ship, and of the officers and crew thereof, has filed his libel in a cause civil and maritime, for possession of, and against a quantity of oil taken from the wreck of said "Napoleon III.," and now on board of the whaleship "Hercules," in the harbor of Lahaina, which is within the maritime jurisdiction of this Kingdom.

It is alleged and admitted that the whaleship "Napoleon III.," while cruising near St. Paul's Island, near the entrance of the Arctic Ocean, on or about the 20th of May last, was wrecked by collision with icebergs, and was a total loss. And it is in evidence that Captain Athearn, master of the whaleship "Hercules," who was engaged in the whaling service in the same sea, received on board his ship, on the morning of the 21st of May, twenty-one seamen who had abandoned the wreck of the "Napoleon III.," who gave him the information of the loss. She was then on the edge of the ice, and lying on her side, with the sea breaking over her, and totally abandoned. The master of the "Hercules" was the first man on board of her. The hatches were off and under water, and casks of oil were afloat, and many stove. On the first day he cut a hole in her side, and on the third day succeeded in getting some casks out. It appears further, that the wreck was at times about one mile in the ice, that is, surrounded by floating ice. The weather

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was bad—both snowy and rainy. The time of service was from the 21st to the 31st of May, which was the last day when any oil was taken from the ship.

It appears further, that about one hundred and twenty barrels of oil were racked off into the casks of the "Hercules," and six small casks taken from the "Napoleon III.," containing about thirty barrels, are now on board the "Hercules," making in all one hundred and fifty barrels. It appeared further that there were saved some one hundred and fifty pounds of rigging, some blocks, and a davit, but of little value. After the evidence was closed, the parties agreed that the Court, in making its decision, should regard the quantity salvaged as one hundred and fifty barrels, and the price at this port at thirty-six cents per gallon ; amount of decree to be fixed, in cash, on said data, which the agent of the ship "Hercules" agreed to pay.

This is a clear case of derelict, and so regarded by the parties, and as the quantity of oil saved and its price at this port is agreed upon, the only duty for the Court to discharge, is the proportion which should be decreed to the libellant. The principle upon which compensation is to be paid in a case of this character is well settled, and it is a general rule in Admiralty to allow one moiety to the salvors. There are exceptions indeed, as Judge Story says, "but they are where the property saved is very inconsiderable, and the gallantry, and danger, and difficulty of the service have been so great as seemed to require an extraordinary compensation, hardly to be measured in value." (1 Story's Rep., 325 ; 5 Rob. R., 322 ; 1 Mason vs. Brig ———, 376 ; 4 Rob. R., 193, "L'Esperance ;" 1 Dod. R., 46 ; 1 Ibid, 414, 421 ; "Elliosa," 2 Dod., 75 ; 2 Story's Reports, 195, case of Sprague and others.)

It is not an inflexible rule, still it is regularly adhered to. It will sometimes vary when the amount of property is very large, and the perils from which the property is rescued not imminent. In this case the value of the property saved is not large, but the perils from which it was saved were imminent. The salvors conducted with great promptness, and exhibited good judgment in their labors, and although it was not pretended that there was any unusual risk to the persons of the salvors, still the labor was severe in the inclement weather of that

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northern latitude. The oil has been on board the ship during her whaling cruise, which makes the freighting service to this port more than in ordinary cases. In view of all the circumstances, I regard this case as coming within the general rule, and therefore decree one moiety of the gross amount of oil, which is seventy-five barrels, to the libellant, and for and in consideration that said oil is to be retained by the salvors, at the price at this port, as agreed upon by the parties, the salvors shall pay to the libellant the sum of eight hundred and fifty dollars and fifty cents (\$850 50), but the costs of Court to be paid by libellant.

November, 1858.

SUPREME COURT—IN BANCO.

OCTOBER TERM—1858.

LOT KAMEHAMEHA vs. J. D. KAHOOKANO, M. KENUI AND A. MOKU.

The Guardian of the plaintiff, in 1848, previous to the enactment of Section 54 of the "Act regulating guardians and wards," passed on 4th August, 1851, rightfully exercised under the law of this Kingdom, the control and management of the plaintiff's property.

A grant of a right of way over land of the ward by the Guardian, or any conveyance of any part of his estate, considered as of the same force and binding effect, as if done by the ward on arriving at full age.

In the absence of any statutory requirement on the subject, no particular form is requisite in the dedication of land to the public use by the owner of the soil. It may be either express or implied.

The question whether such dedication was made, is one of intent, to be decided upon the evidence, and if found to have been made for a special purpose, the public must take and enjoy the way *secundum formam doni*.

Judge ROBERTSON delivered the judgment of the Court as follows :

This is an action of trespass, brought at the last October Term of this Court, by the plaintiff, Prince Lot Kamehameha,

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to recover damages from the defendants for cutting down a fence and entering upon a certain premises, the property of the plaintiff, situated in the town of Lahaina, and known as the "Hoapili premises." The defendants admitted the plaintiff's ownership, and their entry upon the premises, as alleged; but filed a plea of justification on the ground that there is a public right of way over the premises in question. The principal object of the suit being to test the validity of the claim to a right of way, it was stipulated by agreement of the parties that the case should go to trial before the Court, without the intervention of a jury, and that the plaintiff should not insist on the damages claimed in his petition.

The testimony adduced before us is quite voluminous, and somewhat conflicting in its character, and we shall not attempt to rehearse it at length. We understand the evidence as proving, in substance, that previous to the erection of the Protestant Mission Church, at Lahaina, which was built about the year 1832, there was a pathway running from the land called "Waio-kama," through what is now the Church Lot and the Hoapili Premises, on towards the north side of Lahaina, which pathway was not, however, the main public pathway (or *alaloa*) which was situated some distance mauka, near the course of what is now, and has been since 1850, a public street; that soon after the erection of the church a stone wall was built by the people, separating the Church lot from the Hoapili premises, with a gate or opening, however, through which the people went into and out of the Church lot by the old pathway to "Waio-kama;" that about the same time the late high chief Hoapiliwahine, the wife of Hoapili, the then Governor of the Island of Maui, took up her residence upon what is now the plaintiff's premises, for the purpose of being near the Church, in the prosperity of which she and her husband took a lively interest, and she being also at the time feeble in body; that previous to the erection of the stone house, which now stands upon the premises, Hoapiliwahine lived in a grass house near the foot path, where the plaintiff, her adopted son, according to ancient custom, and at that time an infant, lived with her under the care of his kahu; that on account of the dust raised by the people passing through the premises in the dry season,

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and the inconvenience and annoyance resulting from the use of the pathway by the public, Hoapiliwahine placed a restriction upon it, permitting only the chiefs and upper class of people, with the pastor and his family, to pass through her premises, while the mass of the congregation went to the church by the *alaloa*, or public road, which runs along the mauka side of the church lot, except when the *alaloa* was rendered impassable by the winter rains, when she allowed all to pass through her premises; that the pathway was shifted from its original track so as to cross the Hoapili premises farther makai, and the restriction upon the use of it was continued, but with abated stringency, up to the time of Hoapiliwahine's death, which occurred in the year 1842, two years after that of her husband; that after the death of Hoapiliwahine, the stone dwelling house and the premises in question were almost entirely unoccupied for a number of years, and fell into a state of dilapidation; that from the time Hoapiliwahine died until the year 1847 or 1848, the title to the premises was unsettled, but at that time it was decided by the chiefs in council that the plaintiff was the owner, upon which occasion possession was relinquished by Mr. Kanaina to Governor Kekuanaoa, the plaintiff's father and natural guardian, who had the care and control of his property; that in 1847, or the early part of 1848, Polea, as land agent of Mr. Kanaina, in carrying out some instructions given him in relation to inclosing the premises, shut up or obstructed the pathway, so that a petition or complaint was sent to the Legislature by certain church members, praying that the way might be re-opened, as a way to the church; that soon after this Mr. John Ii being about to visit Lahaina on business, was requested by Governor Kekuanaoa to attend to this matter, and to set off a road for the people on the makai part of the Hoapili premises, in accordance with the prayer of their petition; that Mr. Ii accordingly, finding the way shut up or obstructed by a stone wall built by Polea, caused the obstruction to be removed, re-opened the way and set off a road about twenty feet in width, for the people, through the premises in question, to the church gate; that subsequently the road was worked and put in order, under the direction of the lunaauhau of the district, who at that time had control of road labor under the Governor; and that from 1848

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until 1857 the road was used by the public, as a way to the church, without interference or dispute.

Upon this state of facts, it is contended by the defendants that the public have acquired a right of way over the premises in question, either by prescription, or by express grant or dedication.

So far as the defense rests upon the claim to a right of way by prescription, we are clearly of the opinion that it cannot be sustained. It appears by the evidence that the ancient pathway from "Waiokama," through the land now occupied by the church and the Hoapili premises, was but a by-path, crossing what was then uninclosed land, and not a public path for general use leading through the district, or around the island. Or, if it can be considered to have been originally a public way, in a proper sense, its character as such was entirely changed, by the inclosing of the church land and Hoapili premises, and the erection of gates, shortly after the church was built, so as to prevent its being used as a public thoroughfare for all purposes. Its use even as a way to the church was repeatedly and effectually interrupted by Hoapiliwahine; so much so that we cannot regard the partial enjoyment of the way during her life time, as anything more than a permissive use. It will not be denied for a moment, by the defendants, or by any one acquainted with the state of this country previous to the grant of a Constitution, in 1840, that Governor Hoapili, or his wife, Hoapiliwahine, could, at any time before that, have shut up the pathway in question, and entirely precluded all persons from using it, their will being law in that respect, subject only to the control of the King himself. Hoapiliwahine did, in fact, stop all persons from using the ancient path across her premises, but permitted the privileged class to use a pathway to the church, on the track of the road afterwards set off by Mr. Ii, near the makai boundary of the premises. The use of the way by the public, from the death of Hoapiliwahine up to the time of its interruption by Polea, was too short to found a right by prescription. And, whether long or short, it ought not, perhaps, to be allowed to operate against the right of the plaintiff, inasmuch as during that period, the title to the premises was in an unsettled state. For these reasons, we do not consider as established, the justi-

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fication set up by the defendants, on the ground of a public right of way by prescription.

But it is argued that, in the year 1848, there was an express grant or dedication, to the public, of a right of way to the church, over the Hoapili premises, by Governor Kekuanaoa, while acting as the guardian of the plaintiff, and having the care and control of his property, he being then a minor.

To this it is objected that Governor Kekuanaoa was not the guardian of the plaintiff's estate; that even if he had been it is necessary for the defendants to show a written grant, under seal, and for a valuable consideration; and that any such grant made by Governor Kekuanaoa as such guardian, would not bind the plaintiff after he became of age.

That Governor Kekuanaoa, in 1848, as the natural guardian of the plaintiff, rightfully had and exercised, under the law of this Kingdom, the control and management of the plaintiff's property, is, we think, too clear a proposition to admit of a question; and that any grant of a right of way over the plaintiff's land, or any conveyance whatever of any part of his estate, made by Governor Kekuanaoa during the plaintiff's minority, and before the enactment of section 54, of the "Act regulating Guardians and Wards," passed on the 4th day of August, 1851, must be considered absolutely conclusive and binding upon the rights of the plaintiff, is, in our opinion, equally clear.

The act of the plaintiff's guardian being considered then, in this instance, as of the same force and binding effect, as if the plaintiff had been a person of full age and done the act himself, is it necessary, in order to sustain the defendants' plea of a public right of way, by grant or dedication, that such grant or dedication should appear to be evidenced by a written instrument, under seal, and to have been made upon a valuable consideration? In answer to this, it might, perhaps, be contended, on the part of the defendants, that so far as the present case is concerned, this point is covered by the 54th section of the Act of 1851, already referred to. But, apart from this special consideration, we are of the opinion that the question must be decided in the negative. We do not think that the position that a grant or dedication of a way to the public must be evidenced by a written instrument, and appear to have been made for a

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valuable consideration, can be sustained upon authority. On the contrary, we believe it to be sound law that, in the absence of any statutory requirement on the subject, no particular form or ceremony is requisite in the dedication, by the owner of the soil, of land to the public use ; and that such dedication may be either express or implied. (See Beatty & Ritchie *vs.* Hurtz *et als.*, 2 Peters' Rep., 566; Rex *vs.* Lloyd, 1 Campbell's Rep., 260; Rex *vs.* Barr, 4 Campbell's Rep., 16 ; the Marquis of Stafford *vs.* Coyney, 7 Barnewall & Cresswell's Rep., 257; Wood *vs.* Veal, 5 Barnewall & Alderson's Rep., 454 ; Hobbs *vs.* Lowell, 19 Pickering's Rep., 405.)

In the present case, it is contended that there was an express grant or dedication of a way to the public, over the plaintiff's premises. The question whether there was or not, is a question of intent, to be decided upon the evidence presented. Did Governor Kekuanaoa cause a way to be opened, and set off to the public, with the intention that it should be used by the public as a way to the church, without restriction or limitation ? After careful consideration of the testimony, we are satisfied that he did so. The setting out of the way was an open and deliberate act, no circumstance transpired showing an intention to exercise any control whatever over its future use, or to indicate that the setting out of the way was to be understood merely as a license revocable. The public entered upon, and used it, without dispute or molestation, for a period of nine years, six or seven of which elapsed after the plaintiff attained the age of majority. The dedication to the public use was complete and unreserved, as a way to the church, but not for any other purpose ; and the public must take and enjoy *secundum formam doni*.

Let judgment be entered as of the last October term, in favor of the defendants, with costs.

Messrs. Harris and Davis, for plaintiff.

Messrs. Austin and Kauwahi, for defendants.

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SUPREME COURT—IN ADMIRALTY.

GEO. HARRIS *vs.* FRED. WILLIAMS, MASTER SHIP "CINCINNATI."

THE chief mate of a whaleship, having been wrongfully dismissed from service by the master, before the commencement of the voyage, the amount of damages awarded was discretionary and controlled by the circumstances of the case.

ALLEN, C. J.

This is a suit in the admiralty in a cause of damages. It appears that George Harris, the libellant, shipped on or about the 3d of January last past on board the ship "Cincinnati," of which Frederick Williams is master, as chief mate, for a whaling voyage, for the compensation of the 23d lay, and that the said Williams on the next day after the shipment, and before the commencement of the intended voyage, dismissed him from service ; and although said Harris tendered his services again on the next day thereafter, he still refused to recognize him as chief mate, but expressly dismissed him from service on board. The respondent answers that he was justified in dismissing libellant, on the ground of incompetency, and that he is a dishonest and disreputable man, as he verily believes.

It does not appear that the libellant made the contract under any false pretences, and there was full opportunity for the respondent to have ascertained about his qualifications among the seafaring community, for he has been in this service some twenty or thirty years, but he neglected to do this. He makes the contract, and on representations to him about the libellant, takes the responsibility to discharge him, and comes into Court and justifies himself that Harris is not only incompetent but dishonest. I do not deem it essential to give a detailed statement of the evidence. It is admitted that Capt. Coggeshall, from whose ship he was discharged last fall, if present, would say that Harris was an incompetent officer ; and it is also proved that he did say "that Harris had a good name at New Bedford, and was to have \$1,000 bonus, but that he could have got as good a man without giving so large a bonus." I regret that this witness is not in Court. Differences arise, occasionally be-

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tween master and mate, when both are very good and competent men, and it is always unsafe to take the sweeping declarations of a man to the destruction of another in the business of his life. There is also testimony of a witness who knew him, and another witness who had served with him many years ago, as well as one who had served with him on the ship "Herald," in 1854, who speak of him favorably in this service. The latter witness testifies that Harris, who was the master of the ship "Herald," took eleven or thirteen whales of the twenty-five taken on the voyage. This is not an indication of incompetency, and no reason is assigned why he should not be as efficient to-day as he was at that time. It is not proved that he is in bad health, or of intemperate habits, or that he has been negligent, or disobedient in service; no especial reason for incompetency is assigned, but he is sought to be placed in ordinary on the general ground of incompetency. Various opinions are entertained of the competency of a chief officer; there is a decided difference in their efficiency; some excel in physical strength, others in judgment and experience; some are in the prime of manhood, and others have passed the meridian of life, but still are very useful men; their experience and good judgment making up for the depreciation of their manly vigor. The Court cannot declare the libellant incompetent for service from the evidence given. That there are more efficient officers is doubtless true: but because there are, it is no reason to declare him incompetent. It appears that he has been many years master of a vessel: this would not render him incompetent as first officer. His experience ought to give a man skill and ability in command. In all the pursuits of life there is great disparity in the ability of those engaged, still none can be treated as unworthy of hire unless specific cause is shown of deficiency of qualifications for the special service.

General allegations of those who have not served with the individual are not sufficient, especially when disproved by those who have. The testimony of the one is from actual knowledge and personal observation, and the other from rumor, which is too often unfounded. In relation to the charge of dishonesty while in command of the ship "Herald," I am of opinion that it is entirely unsupported by the evidence.

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In view, therefore, of this case, which I regard as a wrongful dismissal of a seaman before the commencement of the voyage, what is the proper principle of estimating the damages? In reviewing the maritime codes of the most enlightened nations, I find that in a similar case the rule of the Consulate del Mare and of Racgus is that the wages shall be paid in the same manner as if the mariner had performed the whole voyage; yet, in a similar case, the ordinances of the Hanse-towns, and of France, give the mariner only one-third part, and the ordinances of Wisby one-half part of his wages, although in cases of dismissal after the voyage is begun, the whole wages are allowed. The settled rule, as the admiralty law is administered in England, is that if a seaman is wrongfully dismissed before the voyage is begun, he is entitled to wages during the time of his service, and to a reasonable compensation for any special damage which he may have sustained. Flanders, in his work on maritime law, lays down this rule: "That if, after the hiring of seamen, the owners of the ship abandon the intended voyage, or if it be broken up for any cause not arising from the fault or misconduct of the crew, they are entitled to receive wages in the nature of damages, the amount being discretionary and controlled by the circumstances of the particular case." (Abbott on Shipping, 749; *Wolf vs. the brig "Oder,"* 2 Peter's Adm. Rep., 261; *Parry vs. the "Peggy,"* 2 Brown's Adm. App., 533; *Bray vs. the "Atalanta,"* Bee's Rep., 48; the "*Fair American,*" *id.* 135.) And I regard the principle equally sound when the seaman is wrongfully dismissed before the voyage is begun. (2 Galls., 58.) There seems to be good sense in this rule of awarding damages. Where a seaman is dismissed on a given day and shipped the same day on equally good wages, and without injurious and unfounded aspersions on his character, the damages certainly would be nominal only. In other cases he may be retained on shore for months before another opportunity to ship offers; and indeed special damages may be proved. So there is wisdom in the rule of fixing the amount according to the circumstances of the particular case.

In the case of ship "*The City of London,*" (8 English Admiralty Reports, 1 W. Rob., 89,) it appeared that a mariner had shipped on a voyage to New South Wales and the East Indies,

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and back to England, and was discharged by the master before the commencement of the voyage, two days after the shipping articles had been signed.

Lushington, Judge, says : "That the mariner, in being thus deprived of his employment on board his vessel, has sustained a loss for which he is entitled to a remedy. In all cases of this description, some loss will generally accrue to the seaman so discharged. The amount of that loss, however, must vary according to circumstances, and, in some cases, it is obvious the loss sustained may be very considerable. For instance, the discharge of the mariner may occur at a season of the year when another engagement cannot be obtained ; the consequence of this must be that the seaman must, for the time, be thrown altogether out of employment. For this, it is clear, he must have a remedy."

All the cases referred to are applicable to the fixed wages of merchant seamen. In the lay, or share of whale ships, there can be no basis to decree a settlement of proportion till the voyage has terminated, therefore, as the libellant has thought proper to institute his suit before the voyage has commenced, under any rule of the maritime code in any country, a compensation based upon the value of a contract dependent upon such contingency, is without a precedent and repugnant to the principles which regulate the measure of damages. The contract for marine service varies in some material respects from those to be executed upon land. When a man neglects or refuses to fulfill his contract of personal service, he cannot be compelled to perform it by any restraint upon the freedom of his person. The remedy is for damages for breach of the contract. The mariner's contract is an exception to this rule. Whenever a seaman fails to render himself on board according to his contract, he can be pursued and arrested wherever he is found, and constrained to complete his engagement ; and punishments are allowed by the law in some cases to be inflicted for neglect of duty or breach of obligation. These peculiarities of the marine contract are undoubtedly founded on sound reasons of policy and necessity ; but while they are thus regarded by the general law of the sea, there should be a corresponding obligation on the part of the master to regard the

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contract scrupulously and not vacate it without a sufficient cause. The special injury arises from the fact of the discharge and from the inability to find employment in the same service. A master has no legal right to annul a contract at his pleasure, any more than a seaman has, although the remedy in the one case and the other is very different; while the seaman may be compelled by force to fulfill, the master is only liable in damages. "The law," says Parsons, "makes no important distinction between the officers, or mates, as they are usually called, and the common sailors." The former are entitled to the same rights, advantages and security, although their duties and obligations are of a higher order. The counsel for the libellant contends that the expenses of his return to his home in New London, and the value of his time in returning, should be included in the estimation of damages. The maritime law makes a striking distinction in a case of wrongful dismissal, between the occurrence, before and after the voyage is begun. Judge Story says, that if a seaman is wrongfully dismissed after the voyage is begun, he is entitled to his wages for the whole voyage; not so, when the dismissal is made before the voyage is begun. In the latter case he is entitled to wages during his retainer in the service, and to a reasonable compensation for any special damage, according to the circumstances of the case."

In the case of *Emerson vs. Howland* (1 Mason, 45-43), Judge Story said: "In some of the adjudged cases, indeed, wages up to the successful termination of the voyage have been allowed; in others, wages up to the return of the seaman to the country where he was originally shipped, without reference to the termination of the voyage. But these apparent contrarieties are easily reconcilable, when the circumstances of each case are carefully examined. In all the cases a compensation is intended to be allowed which shall be a complete indemnity for the illegal discharge, and this is ordinarily measured by the loss of time and the expenses incurred by the party. It is presumed that after his return home, or after the lapse of a reasonable time for that purpose, the seaman may, without loss, engage in the service of other persons; and where this happens to be the case, wages are allowed only until his return, although the

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voyage may not then have terminated. On the other hand, if the voyage has terminated before his return, or before a reasonable time for that purpose has elapsed, wages are allowed up to the time of his return, for otherwise he would be without any adequate indemnity." (The "Beaver," 3 Rob., 92; ship "Exeter," 2 Rob., 261; Hoyt *vs.* "Wildfire," 3 Johns., 518; Brooks *vs.* Dorr, 2 Mass., 39; Ward *vs.* Ames, 9 Johns., 138; Sullivan *vs.* Morgan, 11 Johns., 66; the "Polly" and "Kitty," 2 Peter's Adm., 420-423, note; the "Gloucester," 2 Peter's Adm., 403-406, note; the "Little John," 1 Peter's Adm., 115-119-120.)

Judge Ware, in the case of Hutchinson *vs.* Coombs, 7 Am. Jur., 37, says that, "If a seaman is discharged abroad without justifiable cause, and without his own consent, the measure of damages is the full amount of wages till the return of the vessel, and the expenses of his own return. The intermediate earnings of the seaman may be deducted from the expenses of his return, but not from the wages due."

In the case of Mahoon *vs.* the "Gloucester," 2 Peter's Adm., 403, the doctrine is held "that where seamen were turned off from a privateer without lawful cause, they were held to be entitled to their proportion of the prizes taken during their absence."

If a master of a vessel is wrongfully discharged from his command, he would not be satisfied probably if he was paid for the time spent in making the contract, any more than a merchant would be who had made a contract for a supply of goods for the season, and the vender refused to deliver them, finding that he could make a better sale. The principles of law and of justice require a compensation according to the circumstances of each particular case, and not necessarily limited to the time occupied in making the contract or in its partial fulfillment. The master of a ship has not the frequent opportunities of service as the officers, nor the officers as the seamen, and the ability of the one is far superior to the other, therefore a different rate of compensation for the breach of the contract is very properly made. It does not appear by the evidence that the libellant has been injured by any declarations of the respondent, as distinct from the dismissal from service, although the answer

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may be regarded as somewhat inflamed ; but the dismissal itself will cause injury in some degree, for it occurs at a season of the year when there are few opportunities to engage in the whaling service in that capacity.

The material points so ably presented at the bar have been carefully considered, and it only remains for the Court to pronounce the decree, which is, that the sum of one hundred dollars, together with costs of suit, be awarded to the libellant. Decree accordingly.

Mr. Harris, for the libellant.

Mr. Bates, for the libellee.

SUPREME COURT—MANDAMUS.

C. C. HARRIS *vs.* WARREN GOODALE, COLLECTOR-GENERAL OF CUSTOMS.

THE act of an executive officer can not be examined by mandamus, which invades the exercise of his judgment or discretion ; but where the mode and requisites of the law, regarding the entry of goods, had been complied with by the authorized agent of the importer, upon a refusal by the Collector to permit the entry, the Court held the remedy at law to be inadequate, and ordered a peremptory mandamus to be issued.

ALLEN, C. J.

This is an application for a writ of mandamus to be issued to the Collector-General of Customs directing him to grant a permit for the landing of certain goods now on board the bark "Frances Palmer," and which are the property of John H. Strauss. The material facts in the case were : That C. C. Harris was the legally authorized agent of said Strauss for the purpose of making the entry of these goods at the Custom House ; that he went to the Custom House with the bill of lading and the original invoice to make the inward entry, and offered to verify the same by oath agreeably to the requirement of the

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law. He also offered to pay the duties, and proposed to have every package opened in the presence of an officer of the Customs, that the contents might be examined, proposing to pay the fees of the officer for the extra trouble, but the Collector-General declined to administer the oath to said authorized agent, and to grant the permit to him, but was ready to do so to Mr. Strauss, the owner, on his compliance with the law.

It appeared that there had been some difference of opinion between the Collector and Mr. Strauss in relation to the entry of these goods, for he had at one time deputed his clerk to make the entry, but the Collector declined to grant the permit to him. But all that is alleged to have transpired antecedently to the agency of Mr. Harris, has no bearing on the legal right of Mr. Strauss. The Collector-General is an efficient, upright and valuable public officer, and the Court is fully aware that he would not intentionally do an act which would work a failure of justice.

The counsel for the Collector contended that the Court had not power to compel an officer of this class to do his duty, unless where individual rights were concerned, and in such case it was within the legal discretion to grant or withhold a mandamus. That the Custom House would be deprived of a most wholesome check upon smuggling if persons were allowed to make their entries by an authorized agent. That the owner or consignee have never made any entry of the goods, and that no one could enter the goods unless he was the owner or authorized agent at the time the vessel entered the port. (Sec. 6, Laws 1848).

That it was necessary to swear to the original bills of lading and invoice, and exhibit them at the Custom House.

That it was in the discretion of the Collector-General to judge as to whom he would administer the oath, and was bound only to administer it to the party authorized to make entry by law.

The law prescribes the mode of entry of goods. The statute is in these words :

"Whenever any inward entry shall be made at the Custom House, the person making such entry shall exhibit to the Col-

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lector the original invoices and bills of lading, and verify the same by oath. (Sec. 7.)

“No person shall enter any goods, and secure the duties on them as principal in the bonds, unless he is the owner or consignee at the time the vessel enters the port, or unless he is the authorized agent of such owner or consignee.” (Sec. 9.)

The question is—has the law been complied with? It is admitted that Mr. Harris was duly authorized by Mr. Strauss to make the entry; that he tendered the inward entry and offered to verify the same by oath, as well as to comply with all the requirements of the law.

The duty of the Collector is purely ministerial in this case; the law prescribes it, and he has no discretion in the matter. His duty is to carry out the law. The Court is clearly of opinion that the Collector had no right to connect this case with anything which may have transpired between the parties before, unless he could show a legal connection.

It is sound law that an act of an executive officer cannot be examined by mandamus, which invades the exercise of his judgment or discretion. But in the entry of goods the mode and requisites are prescribed by law clearly, and, if complied with by the importer, the Collector is enjoined by law, to allow the entry to be made, and to grant the permit. The Court is of opinion that the importer did all that the law enjoined, and that the Collector should have made the entry and granted the permit. In relation to the construction of the 9th Section of the statute, I think there cannot be a doubt that it intended to give to the importer the right to appoint an agent to perform this Custom House duty without regard to the time of the arrival of the goods. It would be an exceptional law to deprive an importer of the right to appoint an agent to perform his Custom House business. I am not aware of any provision in any commercial State analogous to this, and I am quite as sure that the Legislature did not intend the power or right of creating an agency thus limited. It would be an implication of the importer which could not have been intended, and a restraint not imposed on any other class.

I do not propose in this case to discuss the principles which govern courts in issuing writs of prerogative, and I will only

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refer to the case of *Kendall vs. United States*, in which the Court say "That the authority to issue the writ of mandamus to an officer of the United States, commanding him to perform a specific act required by a law of the United States, is within the scope of the judicial powers of the United States under the Constitution."

And the Court in this case decided, that the Circuit Court of the District of Columbia has jurisdiction to issue a writ of mandamus to the Postmaster-General, to compel him to do a merely ministerial act, which the relator has a complete right, under an act of Congress, to have done by him, and as to which he has no discretion.

The power to issue the writ of mandamus is given to this Court by the law, and the Court regard it a duty to interpose in a summary way to supply a remedy, when for the want of a specific one, there would be a failure of justice. The remedy at law fails to be complete and adequate for the reason that, although the Collector-General may be liable to a suit, still the delay incidental to legal proceedings would perhaps subject a merchant to the loss of the market for the season; to great delay in his business, and on heavy importations to irretrievable ruin.

The Court, therefore, order a peremptory mandamus, directed to the Collector-General of Customs, to be issued.

Mr. Harris, for the prosecutor.

Mr. Bates, for the Collector-General.

SUPREME COURT—IN ADMIRALTY.

J. SHIRLEY *vs.* BARK "ITALY."

An error of judgment in not properly securing a whale which had been killed and anchored in the ice on the part of an officer of a whaleship, is not such a dereliction of duty as will warrant a forfeiture of wages.

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It is not every slight act of disobedience which will authorize such a penalty, but the Court must be satisfied that the seaman has been reckless and faithless in his duties and exhibited a habitual disregard for the interests of the voyage.

ALLEN, C. J.

This is a libel for a lay or share in a whaling voyage, in the nature of seaman's wages. It is alleged that the libellant, in January last, shipped in Honolulu, as third mate on the American bark "Italy," for a whaling voyage to the northern seas for the season, at a lay of one forty-fifth (45th), to be discharged here ; that the voyage was performed and the ship returned to this port with 1,180 barrels of oil and 15,803 pounds of bone, and that he is entitled by the shipping articles to his lay as aforesaid on said amount of oil and bone, at the prices fixed at the United States Consulate, which is 32 cents per gallon for oil and 50 cents per pound for bone, but that the said respondents refused to settle and pay him according to the terms of the said contract.

There was a special answer put in by the owners, in which they admit that the said libellant shipped and served as third officer on said bark, and performed a whaling voyage to the northern seas on the terms specified, and that the said bark brought to this port the quantity of oil and bone alleged.

They further answer that an advance of \$115 was paid to said Shirley, and that he has forfeited all right and claim to any lay or share in the catchings and savings of said bark, because he disobeyed the orders of his superior officers and failed to perform his duty, in consequence of which a whale which had been captured and killed in Shantar Bay, in the Ochotsk Sea, which respondents allege would have yielded fifty barrels of oil and the usual proportion of bone, was lost to the said bark, and that the value thereof, which is rightfully chargeable against the respondents far exceeds the amount claimed by him as his lay or wages on said bark, which after deducting his said advance and interest thereon and the other usual charges, would amount to a comparatively small sum of money.

By the contract the seaman is to give his time and exertions to the best interests of the voyage ; he is bound to obey all lawful commands, and it is a principle of law that whatever amounts

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to a breach of the contract will affect his claim for wages. In cases of an aggravated nature, where there has been an entire breach of the contract, a total forfeiture of wages may very properly be decreed. Still, as has been wisely said in the case of the ship "**Mentor**," by Chief Justice Story: "Those judges in our Courts, who have been called most frequently to administer this branch of the law, have certainly not felt themselves bound to inflict the forfeiture of wages for slight misbehavior, whether by disobedience or negligence."

I certainly should regard a determined disobedience of orders as worthy of being treated with severity.

In this case the counsel for the defense contend that the libellant has forfeited his wages by not taking care of the whale, as ordered, and that at least he should have ordered one boat to have remained by the whale during the night. The testimony is, that in the month of July last, in Shantar Bay, a whale was taken and killed by the first officer and men of the schooner "**E. L. Frost**," tender to the bark "**Italy**," and the 4th mate of the bark; and, soon after, the libellant and the first officer of the "**Italy**" came up, each in his own boat, and the four boats towed the whale out of the ice, but as the tide had turned, they were forced to anchor the whale, which was near sundown. The libellant was asked by the first officer if he was willing to remain by the whale with Mr. Melville, the fourth mate; he replied that he was willing to do anything for the benefit of the voyage, and he would do so; whereupon the first officer of the bark and the first officer of the tender went on shore.

It appears in evidence by the testimony of the respondents, that after they had been by the whale some three or four hours, they hauled the whale to the surface of the water, but as they could not take the anchor, the tide turned and took the whale down again, and the anchor sunk the whale a second time. Shirley and Melville tried to get the anchor, but as the tide run so fast they could not do it. A witness of respondents, who was a boatsteerer in the fourth mate's boat, says they should have had a tripping line bent to the anchor when the whale was first anchored, and still he thinks if they had cut the line it would have saved the whale. Shirley and Melville remained a short time after by the whale, and then went on shore for refresh-

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ment, which was variously estimated from eight to twelve miles. The men had been all day in the boats and were cold and fatigued. It appears that they remained on shore but a short time, and returned to secure the whale, but they could not find him.

The same witness says : " We had the bearings of the whale ; all we could have done was to have laid by until the tide turned again in six hours ; one boat could have stayed by the whale, although one could not steer the whale ; the drag might have been carried off by the ice ; the whale first sunk when the tide was running out, and afterwards when the tide was running in, and then we should have waited until the next slack tide to work on him ; the flood that was then making would bring the ice back into the bay, and it would be after daybreak before the next slack tide, as I remember it now ; the ice as it came back would have been dangerous to the boats if it was thick—if not, it would not ; the crew were natives, and are sometimes afraid of the ice ; I did not see anything to indicate that Mr. Shirley did not act to the best of his judgment."

It is not very unusual to anchor whales. The first officer of the bark says : " I have left whales myself before, but always when I knew where to find them ; I do not know of any custom to make a man forfeit his wages for leaving a whale." Shirley supposed he had left the whale where he could find him, for he took his bearings and returned to the place as soon as he could go on shore, get some refreshment and return. There was no delay, no shirking of duty. The fourth mate of the bark says : " That he thought that on their return, it would be slack tide, the whale would have risen and been fast to his anchor ; we acted to the best of our judgment."

In the case of *Drysdale vs. schooner "Ranger,"* Bee's Reports, 148, it is decided that wages are not always forfeited by disobedience of a captain's orders, unattended by aggravating circumstances. The laws of Oleran declare " that if a mariner commit a fault, and do not submit, the master may, at the next place of landing, discharge him, and if he refuses to go on shore, he shall lose half his wages and all his goods in the vessel. But if the mariner submit, and the master will not receive his submission, he shall have his full wages." As a general

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principle this is regarded as sound law at this day, but each case rests on its own peculiar circumstances. The mate of the bark testifies that he did not call Shirley to account for the loss of the whale, and there is no evidence that any complaint was made or even a question raised as to the propriety of Shirley's conduct at the time. Indeed, the first officer of the bark says: "I did not call on Shirley to account for the whale; I saw him the next day, and he said they had lost the whale and were looking for him." Had these experienced first officers been as sensitive to their duty, as they are to the unsuccessful efforts of Shirley, would not one of them have remained by the whale and made their best efforts to secure him? It is not to be presumed that they would have left him, had he not been a uniformly discreet and faithful man; and except in this instance there is no intimation that his conduct ever met with his officer's disapprobation. It is not pretended that they were required on their vessels, but said, when they left Shirley and Melville, "we will go ashore and come off early in the morning and see if we cannot catch another whale." It is in evidence by a witness of the respondents, "that a tripping line should have been bent to the anchor when the whale was first anchored." This precaution these experienced officers did not take—was this a neglect of duty for which they should suffer? I do not say that it is, although had they done it the chances of saving the whale would have been greater. The witness further testifies that Shirley and Melville both tried to get the anchor out, but could not do it, and he thinks if they had cut the line they would have saved the whale, and the first officer of the tender is clearly of opinion that this would have saved him. They may have spent too much time in trying to get the anchor, when they should have cut the line at once and left the anchor. At the instant Shirley and the officer with him thought differently, and it is very clear that they acted according to their best judgment under the circumstances, and I am not at all satisfied that experienced whalemén would have acted otherwise. It is very easy for one to say what he would have done in a given situation, but place him there and it does not follow that he would have been of the same opinion. Shirley continued in the faithful discharge of his duty to the termination

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of the voyage at this port. There was no act of submission required, for no complaint was made, and hence it is the duty of the Court to look with caution upon charges which work a forfeiture of wages, that are made long after the acts complained of have transpired. The first officer of the bark reached the place when the first officer of the tender and the fourth officer of the bark had the whale dead, and he says, the libellant came along with him in his own boat—the whale was towed out of the ice by the four boats—they made no headway because the tide was so strong, and were forced to anchor it. In this state of the case, he says that “the ice was pretty strongly packed” and night coming on, “the sun was setting when we left the whale.” It perhaps would have been faithful and discreet for one of these first officers to have remained by the whale, as neither were required on board their vessels, so that the most that can be made reasonably of this is, that Shirley omitted to do what these first officers regarded it as his duty to have done, and therefore should suffer a forfeiture of his wages.

Still the first officer of the bark says, “that every man should use his own judgment when left by himself.” Why then should Shirley be subject to the forfeiture of his wages for following this rule of the officer who left him in charge of the whale? Shirley exercised his own judgment in view of all the circumstances of the case. He and his men had been in the boats all day till late at night, and they were cold, hungry and fatigued. He decided to go on shore and get refreshment and return in the morning, taking the bearings of the place where the whale was anchored. Had he remained, it is very uncertain whether at the return of the tide, with the ice, the boats would have been able to have secured the whale. Be this as it may, I do not regard it as disobedience, but the exercise of a discretion, strictly within the line of duty; for no course of conduct was prescribed for him in view of contingencies. The only act pointed out by the first officer was, when the tide turned, to take their anchor and tow the whale to the head of the bay. They could not take their anchor, and it is very questionable whether Shirley acted with more indiscretion in not cutting the line than these first officers did in not attaching a tripping

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line to the anchor. He regarded it his duty to his men to go on shore and get some refreshment, and it appears that he remained on shore only time sufficient to get the refreshment and immediately returned to secure the whale ; but in this he was disappointed, and the whale was lost to the ship. On his return to the ship, he was not called to an account ; no complaint was made against him as there would have been, had his conduct been regarded as a violation of his duty. It is not alleged but that he has been a faithful man and discharged his duty fully, except in this instance, and I cannot regard the conduct of this seaman so flagrant as to have incurred the forfeiture of his wages for the season. These persons in the boats were interested in the produce of the whale, to them as important for their share as to the owners, and there was no expression by any one that the course then taken by Shirley was one of doubtful expediency. Chief Justice Story, in the case of the ship "Mentor," 4th Mason 90, says that "it is not a single act of disobedience, or a single neglect of duty, which ordinarily carries with it so severe a penalty ; there must be a high and aggravated neglect or disobedience, imparting the most serious mischief, peril, or wrong ; a case calling for exemplary punishment and admitting of no reasonable mitigation ; a case involving a very gross breach of the stipulated contract for hire, and going in its character and consequences to the very essence of its provisions."

He says further, "I should be sorry to lay it down as a general proposition that any act of disobedience by a seaman, however slight, is of course to be visited with a forfeiture of wages, or will justify a master in dismissing him in the course of the voyage. Such a principle it seems to me would be disastrous to the commercial interests of the country and would involve so many difficulties in its application that the denial of wages would soon, from the necessity of the case, with reference to the ordinary habits of seamen, introduce an essentially different contract into maritime employment." An officer may forfeit his right to command by fraudulent, unfaithful and illegal practices ; by gross and repeated negligence, or flagrant, willful and unjustifiable disobedience (1 Peter's Ad., 247, *Atkins vs. Barns.*) Testing this case by these principles of the maritime law to

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which I have adverted, and which are recognized by all the Courts of Admiralty in the United States, under whose flag the "Italy" sails, and to which, if in a home port, she must submit, I cannot decree a forfeiture of wages in whole or in part. When I can be satisfied from the facts of a case that a seaman had been reckless and faithless in his duties, and exhibited a habitual disregard for the interests of the voyage, I should regard it as a breach of the contract, and that a forfeiture of his wages in whole or in part, would be in conformity to the principles which control the decisions of a Court of Admiralty; and so with gross offenses, if persisted in without repentance and amends, they should be rigorously punished.

In this case it is not proved that there was any intentional dereliction of duty, any wanton neglect, or that he did not faithfully exercise his own best judgment, and under the circumstances, a sound judgment. Indeed, at the time no complaint was made, and I am inclined to the opinion if there had been that by the principle of condonation, which is so scrupulously incorporated into the Maritime Code, that Shirley's subsequent faithful performance of duty would have cured a total or partial forfeiture of his wages and reinstated him in all his rights.

I accordingly adjudge that the libellant is entitled to the amount of his lay as set forth in the libel, less the advance of \$115, and shall direct the decree to be conformed thereto, with costs.

Mr. Harris, for libellant.

Mr. Montgomery, for respondents.

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SUPREME COURT—IN ADMIRALTY.

N. C. BROOKS vs. G. C. ENBERG, MASTER OF THE BARK "GRE-FERBERG."

THE voyage being described in the Shipping Articles as a *whaling voyage*, if, by the act of the master, it was changed to a trading or freighting voyage, and the original purpose was neglected to accomplish other objects, it is a violation of the contract, for which damages in the shape of wages may be awarded, according to the circumstances of the case, to the persons employed under the contract of shipping.

An exchange of articles for provisions for the ship, or trading which does not interfere with the original objects of the voyage, held not to be a deviation, etc.

Parol evidence cannot be admitted to vary the contract of wages in the Shipping Articles.

ALLEN, C. J.

This is a libel for the share of the libellant, as first whaling officer on a whaling voyage to the Northern Seas and back to Honolulu, and also for damages for a deviation of the voyage from its legitimate purpose of whaling to trading and visiting, etc.

The answer admitted the service and share of the libellant, but denied any deviation from the legitimate purpose of the voyage, of trading and visiting as alleged. The counsel for the libellant filed the following demurrer :

"The respondent moves the Court to dismiss the libel in this cause, with costs to the respondent, on the ground that the allegations in the libel do not set forth a cause of action cognizable in a Court of Admiralty. That it was a special action on the case for the nonfulfillment of a contract. That this Court, as a Court of Admiralty, had not the power to try the question of damages in a special action on the case. That the libellant did not allege that he had performed the work, but claimed damages for being prevented from performing his services," which was overruled. It is a general principle of law that contracts for marine service come within the admiralty jurisdiction. The libellant made a contract to serve on board

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the bark "Greferberg," as whaling officer on a cruise to the Northern Seas at a stipulated price as set forth in the libel, and he alleges that he faithfully performed the terms and conditions of the contract on his part. He further alleges that there was taken by the ship 275 barrels of oil, that the master violated the shipping contract by diverting the voyage from its legitimate purpose of whaling to that of trading, as well as many other of its stipulations, which it is not necessary for me here to recapitulate. The Court regards the cause as set forth in the libel as clear and explicit. It is true that the libel claims for a violation of the contract in not whaling, as well as for payment of the sum stipulated in the contract for the number of barrels of oil taken.

Courts of Admiralty do not require all the technical precision and accuracy in pleading, which is demanded in Courts of common law. It is only requisite that the cause of action should be plainly and explicitly set forth, not in any particular formula, but in clear and intelligible language, so that the adverse party may understand what he is required to answer, and make an issue on the charge. (Jenks & Lewis, Wace's Rep., 52.)

The admiralty has jurisdiction over all maritime contracts, wherever the same may be made or executed, or whatever may be the form of the stipulations. (De Louie *vs.* Bait *e' als.*, 2 Gall., 397.)

There has been a great deal of legal discussion by the ablest jurists in relation to the jurisdiction of the admiralty and common law Courts; and at one time it was held that the admiralty had no jurisdiction over mariner's wages because the contract was made on land. But at this day the right of the admiralty to entertain suits for mariner's wages is fully acknowledged. So if after the hiring of seamen, the owners of the ship abandon the intended voyage, or if it be broken up from any cause not arising from the fault or misconduct of the crew, they are entitled to receive wages in the nature of damages, the amount being discretionary and controlled by circumstances of the particular cases. (Hivelas on Maritime Laws; Abbot on Shipping, 749; 2 Peters' Adm. Reports, 261; 2 Brown's Adm. App., 533; Bee's Rep., 48, *ib.* 134.)

The Maritime Codes of foreign nations have adopted the rule

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of the civil law, which gives to the seaman full compensation for the whole period which he has contracted, if he is discharged without his default. In addition to this the Hanseatic and French ordinances allow him the expenses of returning to the country of his departure. The Courts of Admiralty of the United States give the party compensation for the injury he has sustained according to the circumstances of each particular case. Chief Justice Story says "that the Admiralty which in this respect is sometimes followed by the Courts of common law, does not hesitate to pronounce for compensation in a simple suit for wages. It is not that the Admiralty cannot sustain a suit for damages, but it deems it proper to award damages in the shape of wages." He says that, in all cases, a compensation is intended to be allowed which shall be a complete indemnity for the illegal discharge, and this is ordinarily measured by the loss of time, and the expenses incurred by the party. The same principle is sustained in the case of *Sprague vs. Shaw*, (9 John. Rep., 139,) where the Court says, "that it is an acknowledged principle of the marine law that if the master unjustly dismiss a seaman during a voyage, he is entitled to his full wages for the voyage." (Laws of the Hanse Towns, Act 42; 2 Peter's Adm'y Rep., 420; 2 Sumner, *Reed vs. Canfield*, 195; 3 Kent, 239; 2 Mason, 541.)

It appears that there were shipped at this port in addition to the full complement of officers belonging to the ship, five additional officers, or mates, of whom the libellant was the first whaling officer. In the written contract and shipping articles, the rights and duties of these whaling officers is not set forth, as contradistinguished from the officers already belonging to the ship. It appears in evidence that they were to act and did act as boat-headers—and the officers proper, as boatsteerers. It is alleged in the libel that he was to have the management and control of the whaling. This is not the construction which I give to the contract. The master of the ship was invested with the powers and subject to the responsibilities of his command, and I do not see that he has delegated any of this authority by engaging additional officers to his ship, whose only duty was whaling. They were employed to execute his lawful orders. Any other construction would make a separate command on

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board, which is altogether incompatible with the terms of the shipping articles.

The voyage was for whaling, and it is alleged by the libellant that it was diverted from the purpose to trading, and thereby caused great damage to him, for which he should be remunerated.

This is denied by the libellee. This is the principal issue between the parties.

It is the custom and usage of whaleships to take on board some articles of trade, which are found convenient and profitable to exchange for supplies for the ship. This is commendable in owners and masters, for it is very desirable for these persons at sea, to have as often as may be, fresh provisions and vegetables. It is a protection to health, and ought to be encouraged. In this, Capt. Enberg conducted with a proper regard for the comfort and health of his men, and deserves credit for it.

As a navigator, in fine, as a master, in his kind and generous treatment of his men he is an honor to his profession. If he has erred, it has doubtless arisen from a want of a full appreciation of the duties and obligations of the whaling service.

The ablest and best masters of ships differ in some respects in the administration of affairs, but it cannot be denied that the internal police of this ship was creditable to the master.

It is very seriously urged here that there was a culpable negligence and omission in keeping a lookout at the mast head. The evidence is somewhat conflicting in relation to this point, but it does not appear that the first whaling officer ever urged the master to permit him and his associates to exercise unusual vigilance in this particular. Had he done this, it is not probable that the master would have interposed any objection. The only question of difficulty is that of a deviation of the voyage, and a deviation of it from its legitimate purpose of whaling. If the evidence sustains this allegation the libellant is entitled to be indemnified. He made a contract for this object, and none other ; and it is the duty of the master to pursue it honestly and perseveringly, and afford every opportunity to the men employed to exercise their skill and courage in this adventurous business. Had he then any purposes and interests

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which conflicted with the general object of the voyage? The evidence in this case is very voluminous, but I do not deem it material only to advert to the portion which bears upon the material point in controversy. It appears that the bark "Greferberg" sailed from this port for the Ochotsk Sea on the last day of March and arrived in that Sea near Jonas' or St. John's Island on the first of May. The Master of the bark having some articles of trade on board which he wished to dispose of, made an effort to push through the ice so that he could arrive at the City of Ochotsk before the vessel of the Russian American Company. Instead of this course to the northeast he should have given a direction to the ship so as to have kept her in clear water, thereby taking the chances for whales. In this effort to get to the City of Ochotsk, he failed on account of the ice, and he then sailed for the Horse Shoe Bay, where trading was carried on, but nothing incompatible with the business of the ship. From Horse Shoe Bay he sailed for Oudskoi, and here he bargained for some skins, with an understanding to return for them, which he did do in the fall. Thence to Kouran, and between the two places spent twelve or fourteen days. A number of cases of prints and liquors were landed. He was cruising between the different ports, trading and visiting, and whaling, till he put away for Southwest Bay in Shantar Island, where he arrives on the 19th of July, during all this time taking only twenty-five barrels of oil, where he continued whaling until August 25, and took about two hundred and fifty barrels of oil. And here where he was reasonably successful in taking oil, and the prospect was flattering for good success, still he deemed it proper to leave this locality where he had had success, to make passage to Ayan, for the object of seeing the Governor, who was expecting soon to leave. It is in evidence that he landed goods at this place to a considerable amount, which is not very definitely fixed by either party, but altogether beyond what was required for the supplies. From Ayan he sailed to Oudskoi and back again, and thence to Centre Bay, where he went for spars; thence to Petropaulski, where he arrived on the 4th of November, and remained there till the 25th of November. At the latter place he took on board some materials of a ship belonging to the same owners. Here some

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trading was done, and the birthday of the Captain was celebrated. Thence he sailed for Honolulu, where he arrived on the 26th of December.

From the evidence, which I do not deem it necessary more fully to detail, I am satisfied that the Captain did devote his attention to other objects than those which his contract enjoined.

The general principles of law respecting deviations are very clearly understood, and in most commercial countries they give the men a legal right of discharge, and payment of wages at the port of departure. So if the voyage be interrupted and lost by the act of the master or owner, the seamen have a valid claim for an adequate compensation. And when a different construction has prevailed, it has always been required that any alterations of the original voyage that the owners or masters may make, shall be accompanied with notice and compensation to the mariner. By the Danish Code, mariners are not allowed to leave their master on account of an enlargement of the different destination, but are entitled to an increase of wages; substantially the same principle is incorporated in the laws of Holland. (7 English Ad. Rep., "Elize," 182; *ibid* "Countess of Harcourt," 248; *ibid* "Minerva," 347; *ibid* "George Home," 370. See 243, the "Cambridge," 7 Ad.)

Parsons, a very accomplished writer on mercantile law, says: "An extraordinary and unnecessary protraction of the voyage would be a deviation. But that the mere length of the voyage, without other evidence, would not prove this." And this doctrine is sustained by authorities. (12 Wheaton, p. 383; 4 Esp., 25; 2 John. Rep., 138, 143.)

In insurance cases the law is rigid in requiring the performance of the precise voyage insured, and no one can doubt that the rule is founded on sound policy, otherwise it would subject the insurers to hazard not contemplated by the contract.

Delay or change of course to save shipwrecked men is justified by the law, and not regarded as a deviation. A master has no right to deviate from the accustomed route without a legal cause, such as stress of weather, or to procure necessary repairs or to gain convoy, or to avoid capture or detention. (3 Kent, 391.) Nor to substitute another voyage for the one agreed

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upon between the owners and freighters of the ship. Everything beyond the voyage agreed upon, is out of the scope of his authority as master, as such he has no power to change that voyage for another. This doctrine is thus clearly laid down by Flanders on shipping, and sustained by numerous authorities.

I do not consider this decision as establishing any new principle in the maritime law, as it has been intimated by the counsel that such a decision would, but the application of principles already settled to the combination of circumstances as presented in this case, and which, so far as any cases have been reported, may be regarded as new.

The voyage described in the shipping articles was a *whaling voyage*. It was neither a trading voyage nor as a freighting voyage, and if the original purpose was neglected to accomplish other purposes, it was a violation of the contract, and here let me say that I do not regard the exchange of articles of trade for provisions for the ship, or any additional trade which the master may make, in the regular course of the voyage, which does not interfere with the original purpose of the voyage as a foundation for damages on the part of the persons employed.

The question arises then on the evidence in this case, whether Captain Enberg devoted more time than was necessary for the legitimate purposes of supplying his ship to other purposes which may have been interesting and valuable to himself, and in which the seamen were coparticipants. The obligations of contracts are mutual. The master by his contract for whaling promises compensation for services, according to the amount of oil taken, and hence if he lessens the opportunity for whaling, he lessens the chances for a voyage. He violates the spirit of the contract when he ceases to prosecute his voyage with vigor, and with a single purpose. Everything which conflicts with this tends to lessen the aggregate of the voyage, and of course the compensation.

From the evidence I do not perceive that the master resisted the claim for additional compensation from improper motives, but rather from a partial estimate, or appreciation of the exact rights of parties. It has been contended on the part of the master that the intention of going to Petropaulaski was

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known to the seamen, and they did not express any objection. I do not regard it necessary for them to protect their legal rights, to have remonstrated with the master, although in this case it does not appear that the master made any direct communication, and all that was known about it was by general report on the ship. It is said they might have taken passage in the ship "Montezuma," bound to this port, but there is no evidence that a passage was proffered to them, and if there had been, it was not incumbent on them to leave their own ship with their interest of the voyage on board. It was clearly such a deviation as in a freighting voyage would have entitled the men to a discharge, and consequent payment of the wages and expenses to the port of their departure.

The question of damages in this cases is more difficult than in most others. It is contended, on the part of the libellant, that he should have pay for the largest catch of the season, as the opportunity, which was legally enjoined, required, by the contract of devoting the entire season to the whaling business had not been afforded him. It is true that the entire season has not been so devoted, but that a portion of the season has, and in this the ship had not very great success. From the 19th of July to the 25th of August, she was in South W. Bay, and secured about two hundred and fifty barrels in a very favorable part of the season. She took some twenty-five barrels on other grounds which, at times, had been regarded as favorable for whaling purposes, but either from the absence of whales, or the want of entire and vigorous devotion to the business, there was no success. It is not clear that the opportunities of the ship were equal to the highest success, of this the libellant was well advised. He knew the experience of the master and his officers and men in this branch of business, and that it was not so thorough as in many other ships. He could judge, too, quite well of the inefficiency of two sets of officers, who should have different powers on board ship, and in the boats in pursuit of whales, all which would not tend to promote success. I do not think that he had reason to expect the success equal to the best appointed ships. Then, is the average catch of the season a fair basis? To test the accuracy of this, it would require a very clear proof of the capacity and appointments of

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the different ships, barks and brigs, as compared with the "Greferberg," and which has not been adduced, therefore I do not see that this would be an entirely satisfactory mode of fixing the right measure of damages. The better basis is the amount which the ship did take, as compared with the opportunity and advantages of whaling, which was not availed of by the Master on account of the diversion made from its legitimate purpose, which consumed some time at the different ports before adverted to, and also the deviation made to Petropaulski, and the delay made there, which was from the 4th of November to the 26th, when by the contract the master had no right to go out of his way for freight. It consumed time which was valuable at this, the agreed port of discharge to men engaged in the whaling service, to enable them to make new engagements for the next season. This deviation alone consumed very nearly one month.

It is contended that the libellant was by parol agreement, at the time the contract was made and signed, invested with special authority over the whaling operations of the ship. It is a settled principle of law that parol evidence cannot be admitted to vary the contract of wages in the shipping articles. (Gilpin's Rep., 305), and I do not regard parol evidence as competent to impose upon the officer any greater authority, duty or obligation, than what is clearly defined in the shipping articles. Therefore all the injury alleged by a non-compliance with Mr. Brooks' orders is not a subject of a damage, proper for the Court to consider.

The libellant, by the shipping articles, is entitled to one dollar per barrel for the amount of oil taken, which was two hundred and seventy-five barrels, which amounts to \$275.

In view of all the circumstances, not only of the deviation of the voyage from its legitimate purpose during the whaling season, but from the delay incident to the voyage to Petropaulski, as well as the share he is entitled to by the articles, I hereby award and decree the sum of \$600, less \$200 admitted to be paid by respondent, with costs.

Decree accordingly.

C. C. Harris for libellant.

A. B. Bates and J. Montgomery for respondent.

March, 1859.

Franklin M. Phillips *et als.* v. W. J. Rawlins and William Feters.

SUPREME COURT—IN ADMIRALTY.

FRANKLIN M. PHILLIPS ET ALS. *vs.* W. J. RAWLINS AND
WILLIAM FETERS.

ALTHOUGH the general rule of law is, that merely gratuitous services afford no consideration upon which to raise an implied promise of payment, an exception is allowed by the maritime law in cases of salvage service, on account of its peculiar character.

The assistance rendered by the libellants, who were part of a shipwrecked crew, to the respondents, on a shoal in the open ocean (outside the limits of any State or Government), in capturing seals ; held to be a maritime service, cognizable in the Admiralty.

By the provisions of the Act of Congress of the United States, relating to the discovery of guano deposits, all acts done or crimes committed on any island, rock or key, upon which such deposits may be found, or in the adjacent waters shall be deemed to have been done on the high seas, on board of a merchant vessel of the United States, thus placing them by statute under the jurisdiction of Admiralty Courts.

The value of the salvage service, rendered by the libellants, awarded upon a consideration of the facts and circumstances of the case.

Judge ROBERTSON, acting as Chief Justice, pronounced judgment as follows :

The libellants in this cause, Phillips and others, twenty in number, claim to recover from the respondents, compensation for labor and services, done and performed for their benefit, in saving property from the wreck of the whale ship "South Seaman;" and in procuring a quantity of seal oil, at French Frigate Shoal.

It appears, in substance, from the pleadings and the testimony, that the American whaleship "South Seaman," Norton, master, a few days after leaving Honolulu, bound to the northern seas, struck on the weather side of French Frigate Shoal, about six hundred miles from this port, before daybreak on the morning of the 13th March last ; that, after daylight, five boats were lowered and got clear of the "South Seaman," in which the master, officers and crew embarked, abandoning the ship, with provisions and water sufficient for eight days ; that, about two hours after leaving the wreck, while steering, as the Cap-

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tain said, in the direction of Guam, they descried a strange boat, which proved to belong to the schooner "Kamehameha IV," the respondents' vessel, then lying at anchor near a sand spit, with a guano and sealing party under respondents' command; that, the people of the "South Seaman," of whom the libellants were a part, followed the schooner's boat to shore, where they were received in the most friendly manner by the respondents and party, who showed them every kindness in their power; that, two days afterwards, the respondents dispatched their schooner for Honolulu, carrying the master and thirteen of the officers and crew of the wrecked ship; that, the libellants and seven or eight others, the rest of the crew, remained on the sand spit with respondents' party; that, before sailing for Honolulu, Captain Norton gave to respondents four of the five boats saved from the "South Seaman," and requested those of her crew, who remained at the place, to render all the assistance they could to the respondents; that, after the departure of the schooner, those of the "South Seaman's" crew, who were not sick, joined the respondents' party in sealing on the neighboring sand spits and reefs, manning the boats and otherwise materially assisting in capturing a considerable number of seals, sufficient to yield, at least, seventy barrels of oil; that, on the tenth day after the "South Seaman" struck the reef, and on two subsequent occasions, some of her crew, together with one of the respondents and others of their party, succeeded in boarding the wreck, from which they brought away provisions, clothing, whaling craft, and other articles, which, including the boats spoken of as having been given respondents by Captain Norton, are valued at \$1,500, all which property is in respondents' possession; that the libellants were so employed until the return of the schooner from Honolulu, under charter, to bring hither such of the crew of the "South Seaman" as had remained on the sand spit; and that the respondents became the purchasers of the wrecked ship and her materials, which were sold at auction, in Honolulu.

In the course of the argument of the cause, several points were raised in opposition to the claim of the libellants. I shall confine myself to a brief consideration of those points only which I deem essential to a decision.

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It is contended, on the part of the respondents, that the labor and service done and performed for their benefit, by the libellants, were, so far as the respondents are concerned, wholly voluntary and gratuitous, and rendered at the request of Captain Norton, in return for the kind treatment extended to the shipwrecked crew by the respondents; and that the services having been so rendered, raise no implied promise on the respondents' part to pay for them.

So far as regards the salvage service performed by the libellants, the objection here raised has, in my opinion, but little force, because, although the general rule of law is that merely gratuitous services will afford no consideration, upon which to raise an implied promise to pay their worth, an exception to this rule is allowed by the maritime law in cases of salvage service; on account of its peculiar character. (Story on Contracts, sec. 455.) If a real salvage service has been rendered, whether spontaneously or by request, as a general rule, every person who assisted in performing that service is entitled to share in the compensation. (Conkling's U. S. Admiralty, p. 279.) So that, if the libellants united with the respondents and their party, in rendering the salvage service performed in this case, without expressly stipulating that they were to receive no compensation, they are by law entitled, as co-salvors, to share in the reward.

Their claim might be prosecuted either *in rem* or *in personam*, and they have chosen to prosecute it *in personam*, on the ground that the respondents have possession of the salvaged property.

But I am of the opinion, upon consideration of all the evidence, that the services rendered by the libellants, both in saving property from the wreck of the "South Seaman," and in capturing seals, were done at the request, as well as for the benefit, of the respondents, and cannot, in either case, be looked upon as services of the nature understood in law as merely voluntary and gratuitous, and not implying a promise, on the part of those benefited thereby, to pay what they are reasonably worth. (See Addison on Contracts, p. 213; Story on Contracts, sections 454, 456.)

The respondents object further to the claim of the libellants, on the ground that the assistance rendered by them, in captur-

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ing seals on the sand-spit at French Frigate Shoal, is not a maritime service; and therefore, that admitting the libellants are entitled to payment, they have come to the wrong Court to seek for it. In other words, the service is not a maritime service, and the claim to be paid therefor is not cognizable in a Court of Admiralty. This point was argued with much ingenuity by counsel for respondents, and has been carefully reflected on by the Court. My opinion upon the point is briefly this: The *subject matter* of the implied contract upon which the libellants rest their claim for compensation, furnishes the criterion by which the Court must decide the question. Is that subject matter labor and services performed by the libellants, in an employment embraced within the scope of the terms, maritime commerce, or navigation, as understood in maritime law? I am clearly of the opinion that it is. While it is true, as appears by the testimony, that the capturing or killing of the seals, was for the most part effected on land, yet the services rendered by the libellants were mainly performed on the sea, in the manning, navigating, lading and unlading of the boats. And, although the libellants never were attached by contract with the respondents, as mariners, to any particular vessel, or hired for any particular voyage, yet they were employed by the respondents in the prosecution of a branch of business, which is universally recognized as being included in the term, maritime commerce. This is the main consideration. *The nature of the case decides the question of jurisdiction.* And the mere fact that the killing of the seals, and the trying out of the blubber, were done upon dry land, cannot deprive the service rendered by the libellants, of its character as a maritime service, or their contract of its nature as a maritime contract, any more than the fact that the shipwright who builds or repairs a ship upon dry land, can change the nature of his contract or service. (See Benedict's Admiralty, sections 211, 263, 264 and 265; Read *vs.* The hull of a new Brig, 1 Story's Rep., p. 245; De Lovio *vs.* Boit, 2 Gallison's Rep.)

There is weight also in the consideration urged by counsel for the libellants, that any services rendered upon the reefs or spits of French Frigate Shoal, situated as it is in mid-ocean, and not within the limits of any particular State or Government,

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may well be regarded as having been rendered upon the high sea. And, although it is admitted that the respondents had taken possession of the Shoal, with the intent of availing themselves of the provisions of the Act of Congress of the United States, relating to the discovery of guano deposits, it will be observed on reference to that Act that, while providing that the islands, rocks and keys, on which such deposits shall be found, may, in the discretion of the President, be considered as appertaining to the United States, yet the Act expressly declares that, all acts done or crimes committed on any such island, rock or key, or in the adjacent waters, shall be deemed to have been done on the high seas, on board of a merchant vessel of the United States; thus placing them, by statute, under the jurisdiction of Admiralty Courts.

For the reasons already stated, I am of the opinion that the libellants have a just claim to a reasonable compensation, both for the services rendered by them as cosalvors with the respondents, and for those services performed for the benefit of the respondents, in and about their sealing enterprise. And it only remains for me now to adjudge how much that compensation ought to be.

In view of the fact that the "South Seaman" had been abandoned by her master and crew, and become derelict, and considering the circumstance that, from the position of the wrecked vessel on the weather shore of the reef, amidst high breakers, the salvage service was rendered somewhat perilous of performance, I think the value of the entire salvage service may fairly be estimated at one-half the agreed value of the property saved, say \$750. In ascertaining what proportion of that amount ought to be awarded to the twenty libellants, it should not be forgotten that the success of the effort at saving property is attributable, in a great measure, to the exertions of Mr. Ormsby, the fifth mate of the "South Seaman," who, for reasons which he stated, has waived any claim against the respondents; and that several others of the "South Seaman's" crew assisted in the work. In view of all the facts, I consider the salvage service of the libellants reasonably worth four-tenths of the whole, say \$300. It appears by the testimony of Mr. Perry, the mate of the schooner "Kamehameha IVth," that

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the services of the libellants, particularly the Hawaiians, who are good boatmen, and of whom there are thirteen joined in the libel, were very valuable to the respondents, in the business of procuring seals. But then it should be borne in mind, that the respondents furnished the greater part of the means and appliances, and the personal intelligence, necessary to the prosecution of the enterprise, as well as the casks in which to put the oil, and a vessel to convey the same to market. I award to the libellants, on this part of their claim, three-tenths of the value of 70 barrels—2,205 gallons—of seal oil, at the agreed price of 37½ cents per gallon; say three-tenths of \$826 37, being \$248 05; making in all the sum of \$548 05.

Decree accordingly, in favor of the libellants, with costs.

Mr. Harris, for libellants.

Mr. Blair for respondents.

May 20th, 1859.

SUPREME COURT—APRIL TERM—1859.

JAMES HOWLAND vs. SAMUEL JACOBS—MOTION FOR A NEW TRIAL.

According to the general rule, affidavits or declarations of jurors, showing misconduct in making up their verdict, will be rejected.

And if in any exceptional case, affidavits of such a character should be admitted, the names of the jurors whose misconduct was relied on, would be required to be specified, so that counter affidavits by the opposite party might be filed.

Repeatedly ruled by this Court, that a new trial will not be granted, for the reason urged, that the verdict is against the weight of evidence, unless it clearly appears that the verdict is so manifestly against evidence as to lead to the conviction, that either a mistake has been committed, or that injustice has been done through an abuse of power on the part of the jury.

Proof of a new, distinct, and material fact, of which no evidence had been given at the former trial, though such specific fact had a bearing upon the main fact put in issue by the defense; as for example, proof of certain declarations made by the plaintiff after his connection with the defendant had ceased, and shortly before the action was commenced, and which were inconsistent with the facts adduced by said plaintiff at the trial, held not cumulative, and the defendant's motion for a new trial granted.

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Judge ROBERTSON delivered the decision of the Court as follows :

This is an action of assumpsit, in which the plaintiff claimed from the defendant the sum of \$250 for labor and services done and performed for the defendant, on his farm at Kailua, on this island. The jury rendered a verdict in favor of the plaintiff for \$107 75.

The defendant now moves the Court to grant a new trial, on the following grounds, viz :

1. That the verdict is contrary to the evidence and the law.
2. That the jury in rendering their verdict were influenced by suppositions and inductions, not derivable from the evidence and contrary to fact ; and,
3. That since the trial of the cause, defendant has discovered new and material evidence.

We will dispose of the second of these grounds before we consider the others. The verdict in favor of the plaintiff was found by nine out of the twelve jurors, the other three dissenting ; and now the defendant presents, in support of the second ground on which his motion is based, the affidavit of one of the dissenting jurors, to the effect that some of the jurors who agreed in finding the verdict, gave as a reason for so doing, that they believed the defendant had been engaged in distilling spirits from the *ki* root, of which there was no proof, and had employed the plaintiff in working at that business, in addition to the other work expressly proven. In corroboration of this affidavit, the defendant's counsel presents his own affidavit to the same effect, based upon the statements of some of the jurors made to him after the trial. We are of the opinion, as is contended on the part of the plaintiff, that these affidavits are inadmissible ; first, as being excluded by the general rule, which forbids the reception of the affidavits or declarations of jurors, to show misconduct in making up their verdict ; and, secondly, because neither of these affidavits specifies the name of any particular juror, as having declared that his mind was influenced by extraneous considerations. These objections are well taken. In the United States, and in England, ever since the case of *Vaise vs. Delaval*, (1 Durnford & East, p. 11,) in which judgment was given by Lord Mansfield, the uniform ruling of the

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Courts, with scarcely an exception, has been to exclude the declarations of jurors from being received for the purpose of impeaching a verdict by showing misconduct on the part of the jury ; and although there may seem to be force in the consideration urged in this case, that the juror whose affidavit is presented in support of the motion, was not a party to the verdict, yet the principal reason of the rule remains applicable. The jury make up and deliver their verdict under the solemnity of an oath, and no declarations of theirs can be received to controvert its truth, by showing misconduct on their part. Such is the general rule, and we think its soundness unquestionable. And if in any exceptional case we should feel constrained to admit affidavits of the character now offered, we should certainly require the names of any jurors whose misconduct was relied on, to be specified, in order that the other party might have an opportunity to avail himself of the right to file counter affidavits.

In regard to another of the reasons urged for the granting of a new trial, namely, that the verdict is against the weight of evidence, we would remark that it has been repeatedly ruled in this Court, in conformity, we believe, with the vast preponderance of authority on the subject, that a new trial will not be granted on the ground here assigned, unless the verdict is so manifestly against evidence as to render it clear that a mistake has been committed, or that injustice has been done through an abuse of power on the part of the jury. In the present case, evidence proper to be weighed by the jury was adduced on both sides, and, even if the finding of the jury did seem to us against the preponderance of evidence, yet we would not feel justified in setting aside the verdict on that account. It is the province of the jury to respond to the facts, while the Court responds to the law ; and while the Court, in the exercise of its supervisory control, will take care to prevent any party from suffering injustice through an abuse of power on the part of the jury, it will at the same time carefully abstain from anything like a usurpation to itself of the proper functions of the jury.

The last ground assigned in favor of the motion is, that since the trial of this cause the defendant has discovered new and important evidence. He states in his affidavit that, since the

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trial, he has been informed by one George Crane that he had a conversation with the plaintiff, in the month of January last, in which the plaintiff made certain statements and admissions respecting his relations with the defendant, of such a nature as would materially affect the decision of this cause. The defendant presents the affidavit of Crane himself, who deposes to his having had a conversation with the plaintiff in the month of January of the present year, when the plaintiff made the statements in relation to his dealings with the defendant, which are now brought forward as newly discovered evidence for the defense.

It is objected to the granting of a new trial on this ground, that the defendant might, by the exercise of due diligence, have obtained the testimony of Crane before; and that the newly discovered evidence is merely cumulative. We see nothing in the circumstances of the case, which shows such a want of diligence on the part of the defendant, in not procuring this testimony before, as ought to lead us to refuse his motion for that cause. And, while we regard some portions of Crane's proposed testimony as clearly cumulative, and therefore of no value in this proceeding, there are other parts of it to which we think that objection does not fairly apply.

There is an apparent want of uniformity among the authorities, in regard to the question of what evidence shall be considered cumulative, and what shall not. This arises, in a great measure perhaps, from a want of precision in the use of language, and from the great diversity of facts presented by different cases. For instance, in one case it is said, "Newly discovered evidence, to be a ground for a new trial, should respect a matter that has come to light since the trial, and on which the party has never been heard." (U. S. Digest, vol. 5, p. 439, sec. 206.) In another case it is said, "In Mississippi, a new trial will be awarded on the ground of newly discovered testimony; and it seems that, although the newly discovered evidence is intimately connected with some parts of the testimony at the trial, yet if it be specifically distinct, and bear upon the issue, a new trial will be granted." (Ibid, p. 439, sec. 221.) And in another case it is said, "Cumulative evidence is evidence which speaks to facts in relation to which there was evidence on the

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trial." (Ibid, p. 440, sec. 233.) In the case of *Warren vs. Hope*, (6 Greenleaf's Rep., p. 415,) the Court, in specifying certain kinds of proof which would furnish ground for a new trial or review, used the following language: "When the newly discovered evidence relates to confessions or declarations of the other party as to some influential fact, unknown to the petitioner at the time of trial, and inconsistent with the proofs adduced and urged by such party." In the case of *Sawyer vs. Merrill*, (10 Pickering's Rep., p. 18,) the Court said, "After a trial, it is generally easy to find some additional or cumulative evidence; but the rule is, that there shall not be a new trial unless it is newly discovered evidence, and to some new point or ground of action or defense, to which the evidence given on the former trial did not apply." In some decisions it would seem to have been ruled that the newly discovered evidence should be evidence of a distinct kind, or species, from that given at the former trial. But this, we think, is not in strict conformity with the general tenor of authority. In the case of *The People vs. Superior Court of New York*, (10 Wendell's Rep., p. 294,) Savage, Ch. J., cited the meaning of the word *cumulative*, given in Webster's Dictionary, as follows: "That augments by addition; that is added to something else. In law, that augments as evidence, facts or arguments of the same kind." But that learned Judge added, "according to my understanding of cumulative evidence, it means additional evidence to support the same point, and which is of the same character with evidence already produced. For instance, the defendants in the Court below proved by the third teller that the bill in question was not delivered until after twelve o'clock; all subsequent witnesses who prove the same fact are *cumulative*; their testimony is added to or heaped upon that of the first witness."

It is, perhaps, less difficult to decide, in most cases, as to what evidence would clearly be considered cumulative, than it is to say what would not be so; and hence we have been led to examine this point with some care, with the view of arriving at a definition which may serve, in some measure, to guide us in future. Throughout the general current of the numerous cases which we have examined, the leading principle of decision seems to be almost the same in effect, although enunciated in

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diverse forms of expression. When the defense is general, as in this case, and evidence was given at the trial of certain specific facts, tending as a whole to establish the general ground of defense, further evidence upon either of those specific facts would be cumulative. But the rule cannot be held to exclude, as cumulative, evidence of some new specific fact, having a bearing upon the main fact put in issue by the defense; for with such a construction of the rule, it would seem impossible that a new trial for new evidence could ever be obtained, in a case like the present. In this view of the rule we are fully sustained by the able decision of Woodbury, J., in the case of *Aiken vs. Bemis* (3 Woodbury & Minot's Rep., p. 358.)

Testimony was given at the trial, tending to prove by the plaintiff's own declarations, that in the month of May, 1858, after he had been living at the defendant's place for seven months or more, the defendant owed him nothing; but that he was at that time indebted to the defendant thirty or forty dollars. Plaintiff had ceased to live with the defendant by the end of August, 1858. Crane states in his affidavit, that in the conversation he had with the plaintiff, in January last, plaintiff told him that "he was still owing Mr. Jacobs," and "that the defendant had done everything that was honorable to him, the plaintiff." Proof of such declarations made by the plaintiff, after he had ceased to live with defendant, and within two months of the time this action was commenced, is proof of a new, distinct, and material fact, of which no evidence was given at the former trial; and we feel constrained to say, that, upon this showing, the defendant should have the opportunity of again submitting this case to a jury.

The motion for a new trial is granted, upon condition that the defendant pays one-half the costs accrued, the other half to abide the result of the new trial.

J. D. Blair, for the plaintiff.

C. C. Harris, for the defendant.

May 3d, 1859.

E. K. LAANUI *v.* EMELIA PUOHU and George Carsley.

SUPREME COURT—IN EQUITY.

E. K. LAANUI *vs.* EMELIA PUOHU AND GEORGE CARSLEY.

By the common law of this Kingdom, prior to the law approved 4th August, 1851, guardians had, from time immemorial, possessed and exercised the absolute right to dispose of the real and personal estate of their wards.

As between the parties, acknowledgment and registry of a legal conveyance are not necessary.

An assignment of lands, belonging to the intestate, made by the guardian of the heir to the widow, which she accepted, together with some personal property in satisfaction for her claim of dower in the estate of her husband, forms a title in equity sufficient to repel the complainant's claim, and would authorize the Court to decree a conveyance of the legal estate from the heir, if it were in him.

Evidence to give a construction to an agreement inadmissible, it being clear and explicit in its terms and free from ambiguity.

ALLEN, G. J.

This is an appeal from a decision of the Chief Justice on a bill in Equity, in which the complainant sets forth that she is the daughter of one Laanui, a native chief of these Islands, deceased, leaving considerable property to which she and her brother Gideon are the only heirs. That Laanui died intestate, leaving a widow, Emelia Puohu, co-administratrix upon the estate. That Puohu procured a Royal Patent to be issued to G. Laanui, for her, Puohu, of a certain piece or parcel of land in Honolulu, a description of which is set forth in her bill. She further alleges that this lot of land of right belonged to the estate of said Laanui, and that Puohu had no other than her right of dower in the premises. That she procured the Royal Patent to be issued, in her favor, by false and fraudulent representations. That she would not be entitled to any part of the real estate in fee simple, and that said lot is more than one-third of the value of the real estate of the said Laanui. There were some other allegations in the original bill which are not relied upon, or attempted to be enforced on the appeal, so that the only question for our decision is the validity of the title of Puohu to the house lot specified.

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It appears in evidence that Mr. John Ii was appointed guardian of the minor children on the 4th day of November, 1850, and that the amount of the inventory of the estate, as rendered by the administrators, who were Mr. John Ii and E. Puohu, was \$3,083 23, on the 24th day of May, 1851. On the 26th day of May, 1851, property, including this lot of land in Honolulu, amounting in value to \$1,118 11, was assigned to Puohu under the following agreement, viz :

" It is hereby agreed by and between Puohu, the widow of G. Laanui, deceased, and John Ii, the guardian of the children and heirs of the said G. Laanui, that the above named property belonged to the estate of the said Laanui, shall be and is hereby set apart to the said Puohu, and is hereby received by her in lieu and in full satisfaction of her right of dower in said estate.

" In witness whereof, we have hereunto set our hands and seals this 26th day of May, A. D. 1851.

(Signed,)

" JOANE II, [L. S.]

" E. PUOHU. [L. S.]

" Signed and sealed in my presence.

(Signed,)

" W. L. LEE."

It further appeared in evidence that the accounts of the guardian and the administrators were finally settled and the several bonds cancelled, and parties discharged, and that a Royal Patent was issued of said lot of land in Honolulu to Puohu, on the 5th of August, 1856.

It was alleged, on the part of the complainant, that Puohu had obtained her title to the house lot surreptitiously.

By the common law of this Kingdom, prior to the enactment of a law regulating guardians and wards, approved 4th of August, 1851, guardians had from time immemorial possessed and exercised the absolute right to dispose of the real and personal estate of their wards as might suit their own will. It is very clear, then, that Mr. Ii, the guardian, had the legal right to dispose of the real estate of his wards. At the time the aforesaid agreement was made, it was a contingent interest, or claim to the lot in controversy, first to be awarded by the Land Commission, and then a commutation to be made in order to procure a Royal Patent, which Puohu accomplished and not

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the heirs of Laanui. At most their interest was, by the Land Commission Award, but thirty years. In the schedule, to which was attached said agreement and in which were many articles of personal property, there was included "a house lot in Honolulu," valued at \$100. And the language is "that the above named property, belonging to the estate of the said Laanui, shall be and hereby is set apart to the said Puohu, and is hereby received by her in lieu and in full satisfaction of her right of dower in said estate." As between the parties this is a legal assignment of the property. The guardian had a right to convey and the widow to receive the conveyance in the settlement. It is contended that this is not a legal conveyance because it was not acknowledged before some judicial authority. As between the parties that is not necessary. Acknowledgment and registry only have efficiency in protecting innocent parties,—but grantors and their heirs cannot shield themselves, and convey a second time, because the first grantees have failed to have their conveyances recorded. It has been contended that evidence should be admitted to give a construction to the agreement, but the Court regard it as clear and explicit in its terms and free from ambiguity, and therefore that the evidence was clearly inadmissible. The assignment in the present case is proved to have been signed, sealed and delivered in the presence of a witness, and placed among the papers of the estate in Court, and as between the present parties it can not be deemed void whatever might have been the case as to a subsequent purchaser without notice. But, supposing the assignment was not sufficient in point of law to convey the lands, it would form a title in Equity sufficient to repel the complainant's claim. It would authorize a Court to decree a conveyance of the legal estate from the heirs of Laanui, if the legal estate were in them. But it is said that the Privy Council must follow the award of the Land Commission. Do they not do so in this case? They doubtless regarded the agreement for the relinquishment of dower in the estate as at least an equitable assignment of the rights of the heirs to this lot of land, and therefore it was carrying out the purpose of the award to convey to the assigns of the original claimant. And the Royal Patent has placed the legal estate

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in Puohu, but the complainant says that it was surreptitiously obtained.

The assignment bears date May 26, 1851. The claim of the Land Commission to Laanui January 3, 1854, and the Royal Patent August 5th, 1856, and it is in evidence that it was procured by Puohu, with the aid and sanction of Judge Lee, who wrote and witnessed the aforesaid agreement. There was no haste about the proceedings, and it is clear that the Royal Patent was issued in pursuance of the aforesaid assignment.

It was very evident that it was carefully considered, and so regarded by Judge Lee, from the evidence which the complainant has introduced, for it was in pursuance of this agreement, that Judge Lee himself aided in procuring the Royal Patent to be issued to Puohu by the King in Privy Council. It appears that he knew the whole transaction and recommended that the fee simple title should be issued to Puohu; it was an agreement made by the guardian of the infant, and, in my view, under the circumstances of the case, constitutes an equitable bar.

We regard the offer, to pay one hundred dollars by Puohu to the complainant, not as an acknowledgment that her title was defective, but for the purpose of procuring an amicable settlement without further trouble. And the weight of testimony is that the proposition was satisfactory to all parties. The equity of the case is then on this ground in favor of the respondent.

Upon the whole view of the case our opinion is that the bill be dismissed with the costs of the appeal.

C. C. Harris and A. B. Bates for complainant.

J. D. Blair for defendant.

May 3, 1859.

Will of Hewahewa, deceased.

SUPREME COURT—IN PROBATE.

IN THE MATTER OF THE WILL OF HEWAHEWA, DECEASED.—MOTION
FOR A NEW HEARING.

THE Court adhered to the rule, established in the case of *Walker vs. Grimes*, (1st Hawaiian Reports, page 34), that a motion for a new hearing, on the ground of newly discovered material evidence, must be supported by the affidavits of the newly discovered witnesses as to what they could testify.

Judge ROBERTSON delivered the decision of the Court as follows :

The application for probate of the will of Hewahewa was originally made to the Circuit Judge of the Island of Maui, who, after a formal hearing, rejected the will. The applicant then appealed from his decision, to the Supreme Court. The appeal was heard by this Court in the month of February last, and the judgment of the Circuit Judge was affirmed.

The applicant now moves the Court to grant a new hearing, on the ground of newly discovered material evidence. In support of this motion, Patrick Shaw, the husband of the applicant, presents a general affidavit, stating in substance, that since the former hearing in this Court, it has come to his knowledge that there are witnesses living on the Island of Oahu, who were unknown to him at the time of the former hearing, and whose testimony is important to the establishment of the validity of the will. Shaw also states some of the facts which he believes he would be able to prove upon a new hearing.

The motion for a new hearing is not supported by the affidavits of any of the newly discovered witnesses, as to what they could testify ; nor are the names even of any of those witnesses specified in the affidavit of Shaw.

It is unnecessary therefore for us to examine the merits of the proposed new evidence, or the question of the applicant's diligence, in order to decide upon the motion, because of the well established rule, which has been adhered to, we believe, ever since the case of *Walker vs. Grimes* (1st Hawaiian Reports, page 34), that applications like the present should be accompanied by the affidavits of the witnesses to the newly

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discovered evidence, unless good cause is shown why such affidavits have not been obtained; and in any case the names of the witnesses should be specified, together with the substance of what each of them would testify.

The motion is refused.

Messrs. Blair and Harris, for appellant.

Mr. Bates, for appellee.

May 3d, 1859.

SUPREME COURT—IN EQUITY.

JOHN L. RIVES, ADMINISTRATOR, ETC., vs. MAKULU.

A DEED duly registered is good against a prior unregistered deed, if the second purchaser have no notice of the prior conveyance.

Love and affection for brothers and sisters, nephews and nieces, or heirs at law, is a good consideration.

ALLEN, C. J.

This is a Bill in Equity to cancel the record of a deed because it was not legally recorded. The complainant claims a conveyance from the same grantors, but of a subsequent date. It is contended that the deed to Makulu, the respondent, was not acknowledged at the time of the record. This position is sound, unless it should appear from the evidence that the complainant had notice of the conveyance to Makulu when a deed was executed and delivered to him by the same grantor.

It is undoubtedly true that a deed duly registered is good against a prior unregistered deed, if the second purchaser have no notice of the first conveyance. The language of the statute is in these words: "Every deed, lease, or other conveyance of real estate within this Kingdom, hereafter made, shall be recorded in the office of the Registrar of Conveyances; and every such conveyance not so recorded, shall be void as against any subsequent purchaser in good faith and for a valuable consider-

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ation, not having actual notice of such conveyance of the same real estate, or any portion thereof, whose conveyance shall be first duly recorded."

In this case, I am satisfied that the complainant had notice of the deed from Kaiamai and Keahimakani to Makulu, before Kaiamai executed a deed to him, and therefore I regard the rights of Makulu as between the same parties, the same as if the deed to him had been recorded. The statute regards this notice as effectual as a record.

I regard the evidence as conclusive and satisfactory that the deed from Kaiamai and Keahimakani to Makulu was signed by them, and as the equitable interest in the land was in Keahimakani, who was the aunt of Makulu, it was a reasonable and proper conveyance, so far as the parties were concerned.

I regard the consideration as set forth in the deed as valid, (4 Cruise on Real Property, p. 31, sec. 2,) in which the general doctrine is recognized, that the love and affection which a man is naturally supposed to bear to his brothers and sisters, nephews and nieces, and heirs at law, is a good consideration.

But it is said that the complainant had made advances to the grantors, in expectation of this deed. This may be, although there is no proof that Kaiamai had ever made a verbal promise to this effect; still it could not be set up against a *bona fide* conveyance of a prior date. The complainant may have claims against Kaiamai, but it does not follow that they can be legally regarded as a consideration of a deed to defeat a prior conveyance, and that payment can be procured in this way. I regard the deed as conclusive between the grantors and Makulu, and that its priority to the deed to the complainant gives it legal effect. How far the rights of creditors are concerned is another question, and not before me.

Bill dismissed, each party to pay his own costs.

May 7, 1859.

John H. Wood v. M. W. Green.

SUPREME COURT—IN BANCO.

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JULY TERM—1859.
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JOHN H. WOOD vs. M. W. GREEN.

As to the legal age of majority at which a person becomes bound by a contract for goods furnished him, the *lex loci contractus aut actus* must govern. The father of the minor son can not be held liable for articles furnished the latter on his own individual credit, nothing being shown to raise an implied obligation on the part of the parent.

Judge ROBERTSON delivered the decision of the Court as follows :

Plaintiff brought his action in the Police Court of Honolulu, claiming from the defendant the sum of \$25 87, for articles furnished to F. M. Green, the defendant's son, in the year 1855. Judgment was given for the defendant, and plaintiff appealed to this Court.

It appears that the defendant's domicil is in the state of New Hampshire, but at the time this action was commenced, he was in command of an American ship lying in the port of Honolulu. His son, F. M. Green, was living in Honolulu in the year 1855, and was employed as a clerk in a mercantile establishment here, when supplied by the plaintiff with the goods in question, at which time he was between twenty and twenty-one years of age.

By the law of New Hampshire, which fixes the age of majority at twenty-one years, F. M. Green was still a minor when the articles were furnished to him by the plaintiff, and it is argued therefore by the plaintiff, that the domicil of the father being also that of the son, during his minority, the former is liable for the price of the articles so furnished, as for necessities supplied to his infant son. On the other hand, it is contended by the defendant, that, as by the law of this Kingdom, the age of majority is fixed at twenty years, in males, F. M. Green, at the time he purchased the goods of the plaintiff, was of competent age to bind himself by his contract, under the laws of this country, and that the *lex loci contractus* must govern

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in this case. It is argued further, that the defendant is not liable even for necessities supplied to his infant son, unless his express authority is proved, or unless such circumstances are shown as will raise an implied authority; and that, in this case, the evidence shows that the plaintiff furnished the articles to F. M. Green upon his own individual credit, and not upon the credit of the defendant. It was principally upon the last ground mentioned, that the Police Justice gave his judgment in favor of the defendant.

The question as to how far the law of the domicile of birth shall be held to govern the condition and capacity of the minor, in a case like the present, is one upon which a great diversity of opinion has existed among writers on the civil law and on the conflict of laws. An able and lengthy review of the diverse opinions held by many of those writers is to be found in Mr. Justice Story's great work on the Conflict of Laws. At the conclusion of the discussion, the learned author has brought together some of the rules on the subject, which, he says, seem best established in the jurisprudence of England and America. One of these rules is stated thus: "As to acts done, and rights acquired, and contracts made in other countries, touching property therein, the law of the country, where the acts are done, the rights are acquired, or the contracts are made, will generally govern in respect to the capacity, state, and condition of persons." (Sec. 102, p. 188.) Farther on he says, "Hence we may deduce, as a corollary," from the propositions previously laid down, "that in regard to questions of minority or majority, competency or incompetency to marry, incapacities incident to coverture, guardianship, emancipation, and other personal qualities and disabilities, the law of the domicile of birth, or the law of any other acquired and fixed domicile, is not generally to govern, but the *lex loci contractus aut actus*, the law of the place where the contract is made, or the act done. Therefore, a person who is a minor, until he is of the age of twenty-five years by the law of his domicile, and incapable, as such, of making a valid contract there, may nevertheless in another country, where he would be of age at twenty-one years, generally make a valid contract at that age, even a contract of marriage." (Sec. 103, p. 190.) This

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doctrine seems to be sustained by Mr. Burge, in his Commentaries on Colonial and Foreign Law, as cited in Story on Conflict of Laws, p. 189; by the Supreme Court of Louisiana, in the case of *Andrews vs. His Creditors*, (11 Louis. Rep., p. 464,) and in the case of *Baldwin vs. Gray*, on which occasion the Court said, "A foreigner coming into Louisiana, who was twenty-three years old, could not escape from a contract with one of our citizens, by averring that, according to the laws of the country he left, he was not a major until he reached the age of twenty-five." In the case of *Male vs. Roberts*, (3 Esp. N. P. R., p. 163,) where money had been advanced for a minor during his stay in Scotland, (who seems to have had his general domicil in England,) it was held by Lord Eldon, that the question, whether in an English court, a recovery could be had for the money so advanced, depended upon the law of Scotland; for the general rule was that the law of the place, where the contract is made, must govern the contract. (See also *Thompson vs. Ketcham*, 8 Johnson's Rep., p. 189; *Freemoult vs. Dedire*, 1 Peere Williams' Rep., p. 429; Kent's Commentaries, vol. 2, pp. 244, 245, note C.)

That F. M. Green was of legal capacity to make a valid and binding contract, in this Kingdom, at the time he purchased the goods from the plaintiff, and that a recovery could have been had against him on such contract, even in the courts of the country of his native domicil, we think is clear both upon principle and authority.

And we are of opinion that the ground upon which the judgment of the Police Justice was given in favor of the defendant, is just and sound. At the time the plaintiff furnished the goods to F. M. Green, the defendant was not within the Kingdom, nor is there any evidence that he ever had been; F. M. Green was employed in a respectable place, earning his own livelihood; the goods were delivered to him, and charged to him on the plaintiff's books; and all the circumstances tend to show that the plaintiff relied solely upon the credit of F. M. Green himself. It is not pretended that the minor had been driven from home by his father, or that he was destitute of the means of support by reason of his father's neglect to provide for him, or of his own inability to earn a maintenance; nor is anything whatever shown that could raise an implied obligation on the part of the defendant to pay for the goods.

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Under these circumstances, the *onus* is upon the plaintiff to make out the defendant's liability, aside from the mere fact of his being the father of the party furnished with the goods; and this he has failed to do.

The judgment of the Court below is affirmed.

A. B. Bates, for plaintiff.

C. C. Harris, for defendant.

SUPREME COURT—IN ADMIRALTY.

GEORGE CONNOR *et als.* vs. THE PROCEEDS OF SALE OF CERTAIN PROPERTY SAVED FROM THE BRITISH SHIP "VIRGINIA."

EVERY seaman is bound to the business of the voyage, and to bestow his best efforts for the preservation of the ship and cargo.

He is ordinarily excluded from claims as a salvor.

When, however, his connection with the ship, in the capacity in which he shipped, has been, *de facto*, or by operation of law, dissolved, he may claim as salvor.

ALLEN, C. J.

This is a libel for wages and salvage. It is alleged that the British ship "Virginia," whereof James Withers was master, sailed from Greenock, in Scotland, on or about the 25th of September, 1858, bound for Melbourne, where she arrived and discharged her cargo, and sailed thence for Islands in the Pacific, in search of guano; and that the said ship, with the libellants on board, arrived at Baker's or New Nantucket Island, in said Pacific Ocean, on or about the 16th day of May last, and, after making some examination of said Island, attempted to get said ship under way, when she struck on a sunken coral reef, where she eventually became a total wreck.

It appears in evidence that, some few days after the vessel was wrecked, the Captain took the long boat and put on board of her a quantity of stores, the chronometers and some other

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articles of value, with the chief mate and a number of seamen, and embarked for the Fejee Islands for assistance, with which he promised to return to libellants in about six weeks. He gave a memorandum of indebtedness for wages to nine of the libellants, which is as follows :

“ George Connor, £7 13s. 4d. ; John Cox, £6 17s. 10d. ; Charles Anderson, £7 14s. 6d. ; Charles Wilson, £8 4s. ; Robert Cleland, £7 13s. 4d. ; Donald Anderson, £14 8s. ; James Humphreys, £7 16s. ; Henry Christie, £8 ; Thomas Hazard, £8 4s.”

He also gave to Mr. Niel Allen, Robert Campbell and Thomas Hazard an authority in writing, of which the following is a copy :

“ I here authorize you three, jointly, during my absence in the boat for the purpose of procuring aid for you and others, to take you off the Island, to hold and take entire charge of the wreck of the ship ‘ Virginia,’ and all property belonging to her, until my return, and also as much of the wreck as possible.”

The libellants remained on the Island nine weeks and two days, and devoted themselves to the saving the property as far as they were able. At length the brig “ Josephine ” appeared, and in view of the absence of the Captain for some three weeks longer than he declared to them that he should be absent ; of the limited quantity of water, and its bad quality ; of the difficulty and danger of leaving the Island in the boat they had, and of the infrequency of vessels passing the Island ; they decided to embark on the “ Josephine,” for Honolulu, with the property saved from the wreck, where they arrived August 14th last past. They delivered the property saved to Mr. Green, Her Britannic Majesty’s Acting Consul General, at that Port.

It appears further in evidence, that all the men aided in saving the property, including Thomas Peerie, Robert Campbell, William Brown, and Frank Silva, to whom wages were not due.

It is very clear that the seamen have a claim for the amount due them for wages, as stated by the Captain, on the proceeds of the sale of the articles saved from the wreck. (The “ Neptune,” 1 Hazzard, 239 ; “ Sidney Cove,” 2 Dod., 13.)

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Are they further entitled to compensation for services rendered in saving the property, and if so, should it be for services on a *quantum meruit*, or as salvage?

It was evidently the intention of the Captain to put an end to the shipping contract by liquidating the account for wages at the time of his departure for aid; and it is in evidence that the Captain stated to some of the men that their wages were stopped, but that they should receive a salvage for the property saved. They acquiesced in this suggestion.

Every seaman is bound to the business of the voyage, and to bestow his best efforts for the preservation of ship and cargo. Detentions, through perils and disasters of the sea, are risks assumed by seamen in every shipping contract, and no legal right arises to them from those causes, or their extra exertions to save the vessel, to demand an increased compensation. (Abbott on Shipping, 647; *Miller vs. Kelley*, 1 Abbot's Ad. Rep., 567.)

Doubts always arise when seamen attached to the ship lost make application for salvage service. They are in the employment and pay of the owners, and bound by their relation to the vessel to contribute their aid in saving her, and such persons are ordinarily excluded from claims as salvors, and they are allowed a reward in that character only in peculiar cases, as those of extraordinary peril, or gallantry, or when their exertions pass beyond the limits properly incurred by law. (The "Centurion," Mass. Reps.)

The general principle of law is, that the mariner's relation to the vessel is dissolved *de facto*, and by operation of law, when the master has abandoned the vessel and authorized the crew to leave her. Hence it is that persons having been attached to a ship which has been wrecked, and abandoned from necessity, may claim as salvors, when their services exceed their proper duty as seamen, and when their connection with the ship, in the capacity in which they shipped, has been, *de facto* and by operation of law, dissolved. (The "Two Catherine's," 2 Mason, 319; *Hobart vs. "Dragon"*, 10 Peters' Reports, 108-122.)

There must be some peculiar circumstances which will entitle the crew of the vessel lost to compensation for salvage.

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In this case it appears that the wages were liquidated for the past, and a promise, made by the master, for remuneration by the way of salvage for all the property saved after he left the wreck. This is a mode of compensation which he preferred, and in which the seamen acquiesced. In this case it would not materially vary the amount of compensation, whether a specific sum should be awarded as a *quantum meruit* for the service, in the nature of wages, or for a salvage service. But, I regard the principle as sound that, under the circumstances of this case as detailed by the evidence, that the seamen could not sustain a suit for wages, and that their only remedy was for salvage. Had they saved no property, they would have not been entitled to wages, unless, perhaps, Neal Allen, Robert Campbell and Thomas Hazard, could claim by virtue of the direction, given them by the master, to look out for the property and save what they could. From the whole current of the master's declarations, it is very clear that he intended to pay them according to the property saved. And it was, doubtless, wisdom on his part to have taken this course, as the seamen were left without an officer to direct them.

In view of the evidence, I shall decree wages as per account stated by the master and acquiesced in by the libellants.

The net proceeds of the property saved was small, amounting to \$953 26.

The seamen of the ship wrecked were liable to the dangers and hazards which they did incur, and without regard to the saving of property, they would have been detained on the Island till the "Josephine" appeared.

In view of the service rendered, and of all the circumstances of the case, I shall decree to each one of the libellants twenty-five dollars with costs and expenses, which are to be a charge exclusively on the proceeds of the property saved.

It is very clear that the libellants have an equitable lien on the proceeds of the sale of the property saved, stated by the British Acting Consul General to be in his hands.

J. Montgomery for the libellants.

James Beazley, owner, and Mr. Green, Acting British Consul General, for the intervenient.

September, 1859.

• Hart and Hansen *v.* Seven Cases of Specie.

SUPREME COURT—IN ADMIRALTY.

HART AND HANSEN *vs.* SEVEN CASES OF SPECIE.

IN ALL CASES of salvage service, the amount to be awarded rests in the discretion of the Court, guided by an enlightened judgment upon all the circumstances of the particular case; but where the saving of life was connected with the saving of property, although no personal peril was incurred by the salvors, yet the former act was regarded by the Court in adjudicating upon the measure of the compensation to be paid to the libellants.

Before Associate Justice ROBERTSON.

This is an action *in rem*, brought by the libellants, as owners of the British ship "Achilles," commanded by Henry T. Hart, the first named libellant, to recover compensation for salvage services alleged to have been rendered by them, in saving from the American ship "Mastiff," burnt at sea, seven wooden boxes and one iron chest, admitted to contain about \$83,000 in specie and bullion, together with sundry articles of ship's furniture, the value of which as sold at auction is \$392 98.

The facts of the case are in substance as follows :

The clipper ship "Mastiff" sailed from San Francisco on the 10th of September ultimo, bound for China *via* the port of Honolulu, having on board, in all, 208 persons, 175 of whom were Chinese passengers. On the 15th of September, at about half-past four o'clock P. M., when in lat. 30° 46' N., and lon. 128° 35' W., or thereabouts, the "Mastiff" was discovered to be on fire some where abaft of the main hatch; the smoke came up through the ventilator, and Captain Johnson caused the hose to be put to the force pump and sent hands below with it to endeavor to extinguish the fire, but they returned immediately, being driven back by the dense smoke; the pump was stopped, the Captain threw the powder magazine overboard, and caused the usual signal of distress to be made, which was seen by the officers of the ship "Achilles," then distant about four miles from the "Mastiff;" the "Achilles" closed to within a convenient distance of the burning ship and was hove-to to windward of her, being skillfully manœuvered, from time to time, so as to keep a good position; the boats of the "Mastiff" were lowered,

as also one boat from the "Achilles," which rendered material aid in the saving of the Chinese passengers, who were at first much excited, but were restrained from rushing into the boats by the officers and cabin passengers of the "Mastiff," and reassured by the proximity of the "Achilles." In the space of little more than an hour all the lives were saved with the exception of one Chinaman, who it is supposed went below and was suffocated, and efforts were made, but in vain, to save some provisions, but Capt. Johnson succeeded, by cutting a hole through the deck, in saving the specie and bullion, which was carried to the "Achilles" in one of the "Mastiff's" boats, and the burning ship was abandoned to her fate. The wind at the time was very light and the sea smooth, but the witnesses agree in saying that but for the providential intervention of the "Achilles," the circumstances of the case were such that all on board of the "Mastiff" would probably have perished, and the treasure which has been saved must have been lost. The "Achilles" was bound direct for Sydney, N. S. W., with a cargo of 15,000 bags of wheat, but it was agreed that she should proceed to the port of Honolulu, where she arrived on the 27th ultimo.

The case has been argued with ability on its merits by the counsel on both sides, but no point of law has been raised calling for especial notice, save the objection urged by counsel for respondent that the service rendered by the "Achilles" was not a salvage service, and that therefore a claim for compensation upon it is not cognizable in this Court. This objection I consider clearly unsound, and after a careful examination of the facts of the case, which, as they appear upon the pleadings, and have been detailed by the witnesses on the stand, are unusually clear and free from complication, I am of opinion that the libellants are justly entitled to recover, as for a valuable salvage service rendered by their ship, in saving the property libelled from imminent peril at sea—a peril so imminent that I regard the destruction of the property, but for its timely rescue by the intervention of the "Achilles," as inevitable.

For the mere preservation of life, however meritorious the service, this Court has no power to remunerate the salvors; but where, as in the present case, the saving of life is connected

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with the saving of property, the former is not to be wholly lost sight of. (The Aid, Eng. Ad. Rep., vol. 1, p. 84.) It is evident that the efforts of the salvors in the present case were not prompted by interested motives, but by the purest humanity, for they knew nothing of the existence of the treasure until after the rescue of all the lives in jeopardy; and there can be no doubt that the proximity and skillful management of the "Achilles," ably seconded as these were by the admirable conduct of the ship's company and cabin passengers of the "Mastiff," were the means of preventing a fearful loss of life.

While the salvage service performed by the libellants was rendered in the saving of property of great value, the owners of which have consequently been benefited in a corresponding degree by its preservation; and although the property was exposed to the most imminent peril of destruction, yet the case, in its circumstances, is wholly destitute of some important ingredients, such as personal peril or arduous labors of the salvors, or great risk to the salving ship—ingredients which are always regarded by Courts of Admiralty as affording good grounds for awarding to the salvors a large recompense.

In all cases the amount of salvage necessarily rests very much in the discretion of the Court, which, exercising an enlightened judgment upon all the circumstances of the case, and keeping in view the rights of both parties, should give such a fair and liberal compensation as shall subserve the great interests of commerce and navigation, by stimulating those whose business is upon the deep, to the performance of good deeds with alacrity and zeal, by the hope of receiving a befitting pecuniary recompense, as well as the grateful thanks of those whose lives may thus be saved. Without any positive rule to guide me in measuring the reward which the salvors ought to receive in this case, but after a careful perusal of the numerous cases referred to in the course of the argument, and bearing in mind the general and well established principles, which are recognized by the able and enlightened Admiralty Courts of England and America, in adjudicating upon salvage claims, I have determined, keeping, I think, within the bounds of moderation, to pronounce in favor of the libellants, as follows, viz. :

For salvage on the seven boxes and one chest of specie and

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bullion, the sum of seven thousand five hundred dollars; and for salvage on the other articles, which have been sold by consent of parties, the one-tenth part of their net proceeds; the costs and expenses of this adjudication to be borne by the treasure.

Let decree be entered accordingly in favor of the libellants.

J. Montgomery, Esq., for libellants.

J. D. Blair, Esq., for respondent.

October 1, 1859.

SUPREME COURT—OCTOBER TERM, 1859.

JOHN TILLMAN *vs.* THOMAS SPENCER.

In levying upon a ship or any other chattel owned in common, the officer may levy upon the whole, but he can sell only the individual share of the judgment debtor.

A plaintiff in execution does not *ipso facto* become a co-trespasser with the Marshal or Sheriff, if the latter attaches and sells the property of a third party; but by giving bonds of indemnity to the Marshal and directing him to sell the entire chattel, including the property of said party, and by receiving only a portion of the gross undivided fund, renders himself a co-trespasser.

Held also, that such plaintiff received a proportionate amount of the undivided share of such third party, who has a right to follow and reclaim it in the hands of such plaintiff.

Where property is tortiously taken, a party may waive the tort, affirm the sale and sue simply for the proceeds, alleging that they came to the defendant's hands.

And in such action founded upon the tortious conversion of the property, not necessary to show privity between the plaintiff and defendant, as in cases purely *ex contractu*.

A motion to set aside the verdict rendered in favor of a plaintiff and enter a nonsuit, is a motion addressed to the sound discretion of the Court, as controlled by legal principles.

Motion to set aside the verdict, and enter judgment of nonsuit against the plaintiff.

Decision of the Court :

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This is an action of assumpsit, for money had and received to the plaintiff's use, brought to recover one-eighth share of the proceeds of the American whaleship "Nile," sold at auction by the Marshal in the month of February, 1854, upon an execution issued in the suit of Thomas Spencer *vs.* William Bailey and George S. Gilbert. At the trial, the plaintiff proved that, at the time the ship "Nile" was attached and sold by the Marshal, to satisfy the defendant's judgment against Bailey and Gilbert, he (the plaintiff) was the owner of one-eighth part of said ship. It appeared also that when the Marshal attached the ship, which he did by direction of the defendant, he received from him a bond of indemnity, executed by Spencer as principal, and Harris T. Fitch as surety, which was subsequently changed, before the selling of the ship, which was done by the direction of the defendant or of Harris T. Fitch, with the defendant's knowledge and assent, for a bond executed by Fitch as principal and Spencer as surety, the latter having verbally assigned to the former his claim against Bailey and Gilbert. But the suit was prosecuted to judgment in the name of Spencer, in whose name also execution was issued, and to whose attorney the amount of the judgment, with interest, was paid by the Marshal, out of the proceeds of the ship, outfits and appurtenances. The whole amount received by the Marshal from the sale of the ship and appurtenances was \$13,036 40, out of which he paid to Spencer's attorney the sum of \$6,640 74. He paid also nearly \$2,000 for seamen's wages and other claims against the ship at the United States Consulate, together with the expenses and commissions incident to the levy and sale; and the balance, \$3,000 27, he paid into Court as ordered. This amount was afterwards reduced to \$2,770 59, by the payment of two claims against the ship for supplies furnished her at sea.

The jury, under instructions from the Court, returned a verdict in favor of the plaintiff for \$1,392 56, being one-eighth part of the sum paid to Spencer on his execution, with interest thereon; and the defendant now moves to set aside the verdict, and enter judgment of nonsuit against the plaintiff on certain exceptions noted at the trial. The exceptions are as follows:

1. That there was no evidence that the defendant had re-

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ceived any part of the proceeds of the ship "Nile," but, on the contrary, there was evidence that the money paid by the Marshal to Mr. Bates was paid to him as the attorney of another than the defendant, and did not go to the defendant's benefit in any way.

2. That the Court erred in directing the jury that the defendant was responsible for the conduct of the Marshal in taking and selling plaintiff's interest in the ship "Nile," as the testimony distinctly proved that the Marshal acted under the instructions of Harris T. Fitch in selling that property.

3. That the Court erred in not charging the jury, upon request, that the Marshal was not the agent of the libellant in the suit in admiralty of Spencer *vs.* Bailey and Gilbert, but an executive officer of the Court; and if he tortiously sold the property of the plaintiff, he alone is responsible.

4. That the Court erred in charging the jury that it was not necessary for the plaintiff to prove that the defendant received the money as trustee, or with the knowledge of the plaintiff's rights in the property out of which the money was made, or in other words, that there must be privity between the plaintiff and defendant to make the defendant responsible for money had and received.

5. That the Court erred in not charging the jury, upon request, that if they found Tillman was the owner of one-eighth of the ship "Nile," the other seven-eighths being, by his own showing, the property of Bailey and Gilbert, was properly sold to pay Spencer's judgment; and that if Spencer has not received more than seven-eighths of the proceeds of the sale, he has not received for the use of the plaintiff the other one-eighth.

The first point, it seems to us, is clearly unsound, the evidence being that the amount of Spencer's judgment was paid over to his attorney, Mr. Bates, who gave his written receipt for the money, as such attorney, and passed the money into the hands of Spencer's book-keeper. The payment by the Marshal to the plaintiff's attorney was payment to the plaintiff himself; and the private, verbal assignment of his claim to Harris T. Fitch, or any extraneous disposition which he may have made of the money, cannot be allowed to prejudice the rights of Tillman.

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In regard to the second and third points, we would remark that a plaintiff in execution does not, *ipso facto*, become a co-trespasser with the Marshal or Sheriff if the latter attaches and sells the property of a third party; but the plaintiff may, by his acts and conduct, become, in contemplation of law, a participator in the trespass of the officer, and so make himself liable as a co-trespasser. At the trial, some of us entertained considerable doubt as to whether or not Spencer had made himself a co-trespasser with the Marshal in the sale of Tillman's share of the ship "Nile." But we have now no doubt whatever upon that point. The evidence in the case shows Spencer's participation in the acts of the Marshal to have been such as clearly makes him a co-trespasser with the latter, within the ruling in numerous adjudged cases. The trespass of the Marshal did not result from his taking possession of the whole ship, in levying under the execution, but from his selling the share of "Tillman" along with the interest of Bailey and Gilbert, the judgment debtors. In levying upon a ship, or any other chattel, owned in common, the officer may levy upon the whole, but he can sell only the individual share of the judgment debtor. (Brown *vs.* Hedges, 1 Salkeld, 392; Melville *vs.* Brown, 15 Mass. Rep., 82; Beaumont *vs.* Crane, 14 Mass. Rep., 400; Lothrop *vs.* Arnold, 25 Maine Rep., 136.) By selling the share of Tillman, the Marshal became a trespasser, *ab initio*. (Melville *vs.* Brown, 15 Mass. Rep., 81; Walker *vs.* Fitts, 24 Pick. Rep., 194.) And Spencer, by giving bonds of indemnity to the Marshal, and directing him, or suffering others to direct him, on an execution issued at his (Spencer's) suit, to sell the whole ship; and by receiving a part of the proceeds at the hands of the Marshal, through his attorney, Mr. Bates, made himself a co-trespasser with the Marshal, as to Tillman's share of the property.

With respect to the fourth point, it is well settled in the courts of England and the United States, that, in general, a party whose goods have been taken from him or detained unlawfully, whereby he has a right to an action of trespass or trover, may, if the wrongdoer sell the goods and receive the money, waive the tort, affirm the sale, and have an action for money had and received, to recover the proceeds. In such action, founded upon the tortious conversion of property, it is not

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necessary for the plaintiff to show privity between himself and the defendant, as in cases purely *ex contractu*. If the money of the plaintiff has come to the hands of the defendant wrongfully, under such circumstances that in equity and good conscience he ought not to retain it, the law, upon principles of natural justice, raises an implied obligation upon his part to refund it. (*Lamine vs. Dorrell*, 2 Lord Raymond's Rep., 1216; *Moses vs. Macfarlan*, 2 Burrow's, 1008; *Taylor vs. Plumer*, 3 Maule & Selwyn, 562; *Neat vs. Harding and Bowns*, 4 English Law and Equity Rep., 494; *Beardslee vs. Horton*, 3 Michigan Rep., 564; *Gilman vs. Wilbur*, 12 Pick. Rep., 124; *Jones vs. Howe*, 5 Pick. Rep., 290.)

We come now to the fifth point made by defendant's counsel, and which involves the main question in the case, viz: Did the present defendant, after the sale, receive the proceeds of the *plaintiff's share* of the property, or any part thereof? The question here is not as to whether the defendant, co-operating with the Marshal, tortiously took possession of, and sold, the plaintiff's share of the property, for the plaintiff now waives the tort, affirms the sale and sues simply for the proceeds, alleging that those proceeds came to the defendant's hands. Neither the Marshal nor the present defendant is responsible, in *this form of action*, merely because he was a party to the trespass, but can only be held so on the ground of having actually received the proceeds of Tillman's property, or some part thereof. So that this equitable form of action is more favorable for the defendant than would be an action of trespass or trover, supposing either of those could be maintained against him.

It is clear that Tillman's share came to the hands of the Marshal, because he received the *whole* proceeds arising from the sale of the ship and her appurtenances; but it is argued on the part of the defendant, that as he received from the Marshal only a part of the proceeds, not amounting to seven-eighths, he did not receive the one-eighth belonging to Tillman, or any portion thereof, and that his share still remained in the hands of the Marshal, and was paid into Court. . . .

The facts of this case are such as probably arise but very seldom, and we regret that we have not been able to find a reported case precisely parallel, for the circumstances of this case

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are such as to afford fair ground for the ingenious argument of the defendant's counsel. If the plaintiff had owned the whole of the ship "Nile," his right to recover from the defendant the part of the proceeds that came to his hands would be plain. Or if the defendant had received *all* the proceeds of the ship and appurtenances, the plaintiff's right to recover his share from the defendant would be clear.

It is true, as contended by the learned counsel for the defendant, that he had a right to demand from the Marshal a sufficient sum out of the moneys levied under execution to satisfy his judgment against Bailey and Gilbert. But that does not affect the question now to be decided, because the defendant would have had that right as against the Marshal, even if Tillman had claimed to be the owner of the whole property. If Tillman had received, either in person or through his agent, one-eighth of the proceeds of the property, from the hands of the Marshal, before the payment of Spencer's judgment, then clearly it could not be said that the latter had received any part of Tillman's money. Or if Tillman had assented to the payment of Spencer's judgment out of the gross fund, relying for his share upon the balance paid into Court, the like result would follow. But Tillman never assented to such payment, nor to any division or application whatever, by the Marshal, of the proceeds of the property sold; and after mature reflection, we are all of the opinion that the defendant, by receiving a part of the gross undivided fund, must, according to law and sound reason, be held to have received a proportionate amount of the undivided share which belonged to the plaintiff, who has a right to follow and reclaim it in the defendant's hands. The verdict rendered in favor of the plaintiff is not for one-eighth of the whole proceeds, as claimed by him, but only for one-eighth of the sum which actually came to the defendant's hands, together with interest, and that we think is just and legal.

As the motion to set aside the verdict and enter a non-suit is a motion addressed to the sound discretion of the Court, as controlled by legal principles, we think the last argument urged by the plaintiff's counsel, if the grounds which we have already given for refusing the motion were not of themselves sufficiently decisive, would be deserving of great consideration; for so far

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as we are able to see at present, we cannot discover that any benefit would result to the defendant by setting aside the verdict, even were it clear to us that plaintiff had mistaken his form of action. We think no injustice is done to the defendant by permitting the verdict to stand, as obtained in this action for money had and received.

The motion is refused.

Let judgment be entered in favor of the plaintiff, as of the last day of term.

Messrs. Montgomery and Harris for plaintiff.

Mr. Bates for defendant.

SUPREME COURT—IN BANCO.

J. HENNESSY vs. B. F. BOLLES—IN ERROR.

PROPER mode of procedure set forth to entitle a party to the writ of error under the statute.

Upon an assignment of errors, the errors must appear upon the record and not upon the copies of the papers served upon the party.

Upon default being made, an exception to the verification of a petition comes too late when raised on a writ of error, but should be raised at the commencement of the trial and ought not to prevail, if raised after judgment, in any case, certainly not after judgment by default.

A plaintiff in error can not assign for error matter which he might have pleaded in abatement.

A party can not assign for error matter contrary to the record.

Plaintiff's petition and declaration must show a sufficient legal right of action in him to support a judgment in his favor, if not, any judgment that he may obtain is erroneous and without foundation in law.

Judge ROBERTSON delivered the decision of the Court as follows :

The defendant in error, plaintiff in the Court below, brought suit in the Circuit Court for the Island of Maui, to recover the sum of \$350 50, and interest, upon five several promissory

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notes, the first of which is the individual note of the defendant below, payable to George M. Bates, or order, and is indorsed by E. P. Bond, as his attorney in fact; another is a joint note, made by Albert A. Coe and J. Hennessy, payable to the order of Messrs. Bolles & Co.; and the other three are the individual notes of the defendant below, in favor of Messrs. Bolles & Co. Neither of the four last mentioned notes are indorsed by the original payee therein named.

At the last May term of the Circuit Court, defendant having filed no answer, although personally served with process, the plaintiff below had judgment by default for \$401 19, principal and interest, and \$23 25 costs.

On the 16th of October last the defendant below obtained a writ of error, upon application to the Chief Justice, at Chambers, which writ having been returned with the record from the Circuit Court, joinder in error was ordered pursuant to the statute.

This is the first instance of a writ of error having issued from this Court; and it may be well, therefore, to note certain irregularities that have taken place in this proceeding, with a view to prevent their recurrence in future practice.

The plaintiff's petition should have set forth two things in order to entitle him to the writ under the statute, viz: That six months had not elapsed since the rendition of judgment in the Circuit Court; and that execution on that judgment had not been issued and returned satisfied. [Civil Code, section 1,157.] The first of these conditions is shown by the petition, but the last is not averred, nor does it appear in any way. This objection was not raised by the defendant's counsel, and we advert to it merely for the purpose of regulating the practice in similar cases hereafter.

Again, the defendant's plea, or answer, to the assignment of errors, ought to have been filed in writing, in the same manner as a plea in an original action, before the cause came up for argument.

The declaration in error, upon which the argument has been had, is the same that was presented upon the application to the Chief Justice for the writ of error; and the counsel for the defendant takes exception to it as not being in proper form,

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being an assignment of errors appearing on the copies of the papers served upon the defendant below, and not of errors appearing on the record of the case in the Circuit Court. There is weight in this objection, and had it been raised at the time of the application for the writ of error, upon a motion to dismiss the application, it would probably have prevailed. But the objection now comes too late. Joinder in error has taken place upon the declaration as it stands, and the case must be determined on its merits, the errors assigned being regarded as assigned upon the record.

The errors assigned are, in substance, as follows :

1. The petition of the plaintiff below is not verified in conformity with the statute of 1848.

2. One of the notes upon which the suit was brought is the joint note of Albert A. Coe and J. Hennessy, and therefore a several action and several judgment against Hennessy alone is erroneous.

3. None of the notes were made payable to B. F. Bolles, but to other parties. No assignment of either of them to B. F. Bolles is averred in his petition, nor are any of them indorsed by the payees named therein.

The verification of the plaintiff's petition in this case, as it appears upon the copy of the record sent up, is almost precisely similar to the verification in the case of *Kanuku vs. Pukaikaea*, in this Court, referred to in the argument, and is, in our opinion, clearly insufficient under the statute, as was held in that case.

It is a form of verification, however, which has often been used in the Circuit Court of Maui, and the validity of which has probably never been questioned in that Court. Had the defendant below appeared to contest the action, and objected to the verification, the plaintiff must have gone out of Court, unless he was ready to amend the verification, and obtained leave so to do. But the defendant below made default, and, in our opinion, his exception to the sufficiency of the verification comes too late, when raised on a writ of error. A proper verification is necessary to the completeness of a petition, in point of form, but so far as it is necessary for a plaintiff to set forth in his petition a sufficient cause of action, and a right of action in

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himself, these do not in any way depend upon the verification, for if the petition is defective in regard to those points, it can not be aided by the verification. We think, therefore, that any objection to the verification is but an objection for informality—not affecting the merits of the plaintiff's claim—and should, in order to be available, be raised at the outset, and ought not to prevail, if raised after judgment, in any case, certainly not after judgment by default.

It is argued, further, on behalf of the plaintiff in error, that the judgment against him alone, on the joint note of Coe and himself, is erroneous and must be set aside. Although the institution of a suit against Hennessy alone, upon the joint note of Hennessy and Coe, was undoubtedly irregular, yet, we are of the opinion that it is such an irregularity as ought to have been taken advantage of, by plea in abatement, or, perhaps, demurrer under our mode of pleading; and, if not so taken advantage of, must be held to be waived. This is an objection which goes rather to the mode of proceeding, than to the merits of the action. For if the plaintiff below had sued both Hennessy and Coe, and made personal service on Hennessy alone, he might, if he showed a right of action in himself, have had judgment against both, and on execution he could have levied on the sole property of Hennessy to satisfy his judgment. [Statute laws, vol. 2, p. 40, sec. 3; p. 59, sec. 24.] So that in contemplation of law the defendant below is not injured by this irregularity, for if he is compelled to pay the whole amount, he may have his action against the other joint maker of the note, for so much money paid to his use as his share of the note amounts to. A plaintiff in error cannot assign for error matter which he might have pleaded in abatement, although judgment may have gone against him by default. (Crompton's Practice, vol. 2, page 339.) In our opinion, if a party stands off and does not choose to avail himself of this objection before judgment, he must be held to have waived it.

In the case of *Rees vs. Abbott* (Cowper's Rep., page 832), which was an action against one of the makers of a promissory note, declared by the Court to be a joint and several note, judgment went against the defendant by default, and upon writ

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of error in the Court of King's Bench, the Court refused to reverse the judgment; Buller, Justice, remarking that, "If the note had been a joint note only, not a joint and separate note, the defendant could only have pleaded in abatement. It would not have been error."

The case of *Evans vs. Lewis*, cited in 1 Barn. and Alderson's Rep., page 226, "was an action against defendant as drawer of a bill of exchange. It appeared in evidence at the trial, that the bill was drawn by the defendant and another jointly. It was objected that there was a variance between the bill proved and the bill declared upon; and the judge inclining to that opinion, permitted the cause to proceed, with liberty to the defendant to move for a new trial. The Court were afterward of opinion that there was no variance between the bill of exchange proved and that which was declared upon, but that defendant should have pleaded in abatement."

In the case of *Rice vs. Shute*, 5 Burrow's Rep., page 2,611, which was an action for a partnership debt against one partner only, the plaintiff was non-suited. But, upon motion in the Court of King's Bench to set aside the nonsuit, the Court held that defendant ought to have pleaded the objection in abatement, and that his not having done so was a waiver of the objection, and the nonsuit was set aside. The reasoning of Lord Mansfield in that case, seems to us fairly applicable to the case now before us. His reasoning was to the effect that on a partnership debt each partner was liable to pay the whole; that the defendant was not injured by another partner's not being made defendant, because what he pays he must have credit for in his account with the partnership; that if the defendant does not take advantage of the non-joinder at the beginning of the suit, and plead it in abatement, it is a waiver of the objection; that he ought not to be permitted to lie by, and put the plaintiff to the delay and expense of a trial, and then set up a plea not founded in the *merits of the cause*, but on the *form of proceeding*; and that no injustice was done to the defendant by allowing the plaintiff to recover.

In the case of *Scott vs. Godwin*, 1 Bosanquet and Fuller, Chief Justice Eyre, in delivering judgment, said, "In the great bulk of cases where it has been holden, that if there are not

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proper parties to a record, advantage must be taken of it by plea in abatement, the objection has been, that other persons ought to be made co-defendants with the defendant on record; and there is an essential difference between these cases and cases where the objection is, that there are not the proper parties *plaintiffs* in the suit. Many plaintiffs can have but one right, having but one interest and one cause of action, which ought to be, and is, indivisible, admitting of but one satisfaction. * * * * * *

“Whereas in the case of defendants, in respect of the satisfaction they are to make to the plaintiff, it is exactly the same thing whether they are sued singly, or with others, for every individual co-defendant is ultimately liable to the whole demand, and execution may be had against any one. There is therefore more of form than of substance in the objection that others should be made co-defendants.”

As we have already stated, although this suit, so far as the joint note is concerned, ought to have been brought against both the makers of the note, so that judgment, if recovered, might have been recorded against both, yet service upon Hennessy alone would have been sufficient for appearance, and upon a joint judgment rendered against Hennessy and Coe, the sole property of Hennessy might have been attached to satisfy that judgment. (See 3 East., 68, 9; 6 Term Rep., 770; 6 Sergeant and Rawle, 18.)

The last, and, to our minds, by far the weightiest point, suggested as error, is that none of the notes are payable to B. F. Bolles, the plaintiff below, and that none of them are indorsed by the payees named therein, nor is any assignment of them to him averred in his petition. So far as regards the note drawn in favor of George M. Bates, this objection is not well taken, for, upon reference to the record as sent up, it appears that that note does bear the endorsement of George M. Bates, by his attorney in fact, E. P. Bond. Upon the copies served with the summons by the Sheriff, upon the defendant below, this endorsement was omitted, through negligence or mistake. But as we are not correcting errors in the copies of papers served upon defendant, but in the record of the Circuit Court, we can look only to that record, and, unless the error exists there, it does

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not exist at all, for the purposes of this proceeding. A party cannot assign for error matter contrary to the record. (Crompton's Practice, vol. 2, p. 339.) The default of the defendant below is equivalent to an admission on his part of the genuineness of his own signature to the note, and likewise of the validity of the indorsement which appears thereon; and, in our opinion, the judgment upon that note is perfectly regular. (Statute Laws, vol. 2, p. 40, sec. 4.) But, as regards the other four promissory notes, all of which are payable to the order of "Messrs. Bolles & Co.," and none of which are indorsed, it seems to us the suggestion of error is sound. Touching those notes, we regard the default of the defendant below, as being equivalent simply to an admission that he made the notes, and not an admission that they are payable to "B. F. Bolles," or that he has any right of action upon them, for this does not appear in any way, upon reference to the plaintiff's petition and declaration. The plaintiff sues upon unindorsed notes, of which he is not the payee; he does not set forth any assignment of the notes to himself; nor does he aver in his petition that the name "Messrs. Bolles & Co." means in fact "B. F. Bolles" alone, a fact which cannot be presumed.

When a party defendant is duly and personally served with a copy of the petition, and the process of the Court, and voluntarily stands off, suffering judgment to go against him by default, he undoubtedly runs a very great risk; but we take it to be a sound principle of practice, that the plaintiff's petition and declaration, admitting the truth of what is therein averred and set forth, must show a sufficient legal right of action in him to support a judgment in his favor. If not, any judgment that he does obtain is, it seems to us, erroneous and without foundation in law.

We are therefore of the opinion that the judgment below should be reversed as to the four unindorsed notes, and that it should be affirmed as to the other.

Let judgment be entered accordingly; the costs of this proceeding to be equally divided between the parties.

Messrs. Blair and Harris for plaintiff in error.

Mr. Bates for defendant in error.

November 12, 1859.

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SUPREME COURT—IN EQUITY.

HENRY MAY vs. LEVI HAALELEA.

AFTER an agreement has been reduced to writing, it is competent to the parties, at any time before breach of it, by a new contract not in writing, either altogether to waive, dissolve or annul the former agreements, or in any manner to add to, or substract from, or vary or qualify the terms of it, and thus make a new contract, which is to be proved partly by the written agreement and partly by the subsequent verbal terms engrafted upon what will be thus left of the written agreement.

And whether the parties did make such subsequent agreement is a question of fact.

Where by the terms of an agreement or obligation, the interest accruing on a loan is payable at certain specified periods, a demand for the payment of the interest at the time it becomes due, must be shown before compounding of the interest can be allowed.

Under a plea of the general issue, a defendant, when sued for interest due on a promissory note higher than the rate allowed by law, may advance by way of defense any matter of fact or of law, without being required to plead the statute specially.

Before Justice ROBERTSON as Vice Chancellor.

Complainant was formerly in partnership with Mr. Samuel Savidge of Honolulu, constituting the firm of Savidge & May. On the first of December, 1857, the respondent borrowed the sum of \$2,000 from Mr. Savidge, for ten months, interest at two per cent. per month, payable quarterly, for which respondent gave his promissory note, secured by a mortgage on certain real estate. The money lent to the respondent was the money of the firm of Savidge & May, to whom Mr. Savidge assigned the note, by indorsement, at the time he received it. Upon the dissolution of the partnership, on the first of May, 1858, respondent's note and mortgage became the sole property of the complainant, who now files his bill, stating that, a short time before the first of October, 1858, when the note became due, the respondent, through his agent, W. H. Pease, applied to complainant's agent, Samuel Savidge, for an extension of the time of payment, for one year from the first of October, 1858, at the same rate of interest that was originally stipulated, which

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extension was granted. Complainant now prays that the mortgage may be foreclosed, as the note has not been paid at the time agreed upon.

Respondent admits, in his answer, the making of the note and mortgage, but denies that he asked for or obtained an extension of the time of payment for any specific term, and pleads in bar of subsequent interest, and costs, a tender of payment made to the complainant on the 27th of November, 1858.

At the hearing of the cause, the respondent's counsel objected to the introduction by the complainant of oral testimony to prove that the time of payment of the note had been extended, by mutual agreement, for the term of one year from October first, 1858, on the ground that parol evidence could not be admitted to contradict or vary the terms of a written contract. He cited in support of this position *Hoare vs. Graham*, 3 Campbell, p. 56 ; *Thompson vs. Ketcham*, 8 Johnson's Rep., p. 190 ; *Warren vs. Wheeler et al.*, 8 Metcalf's Rep., p. 97, and other authorities. That this is sound law cannot be gainsaid. No legal rule is more clearly established. But, in regard to the construction of this rule, and its applicability to the present case, I do not think the authorities sustain the respondent's counsel in the position he assumed. In my opinion the parol proof which the complainant has been allowed to present, is not, strictly speaking, evidence to contradict or vary the contract evidenced in writing, by the promissory note and mortgage of the 1st of December, 1857, but proof of a new contract—a collateral agreement, affecting the same subject matter, and not defeating, but rather affirming and supplementing, the original contract of loan. And while it is true that parol contemporaneous evidence is inadmissible, to contradict or vary the terms of a valid written instrument, (*Adams vs. Wordley*, 1 M. & W., p. 379,) and that parol evidence cannot be received to show that at the time of making a note, payable by its terms at a specified time, a verbal bargain was made that it should be payable on a certain contingency, (*Woodbridge vs. Spooner*, 3 B. & Ald., p. 233 ; *Rawson vs. Walker*, 1 Stark, 361,) yet, parol evidence of a bargain after a note was given is admissible ; (*Bailey on Bills*, p. 493,) and there may, after a bill is drawn, be a binding promise for a valuable consideration to renew it, and

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this may be proven by parol. *Hoare vs. Graham*, 3 Campbell's Rep., 57; *Smith's Mercantile Law*, p. 327.) A contract which seeks, by subsequent oral matter, to discharge altogether the contract created by the bill, and create a new one, may be shown by parol evidence; it is not inconsistent with the bill. (1 M. & W., p. 379, *Adams vs. Wordley*.)

In the case of *Keating vs. Price*, (1 Johnson's Cases, p. 22,) the Court held that evidence of a parol agreement to enlarge the time of performance of a written contract, previously made, is admissible. In the case of *Goss vs. Lord Nugent*, (5 Barn. & Ad., p. 64,) Lord Chief Justice Denman, in delivering the judgment of the Court, said, "By the general rules of the common law, if there be a contract which has been reduced into writing, verbal evidence is not allowed to be given of what passed between the parties, either before the written instrument was made, or during the time that it was in a state of preparation, so as to add to or subtract from, or in any manner to vary or qualify the written contract; but after the agreement has been reduced to writing, it is competent to the parties, at any time before breach of it, by a new contract not in writing, either altogether to waive, dissolve, or annul the former agreements, or in any manner to add to, or subtract from, or vary or qualify the terms of it, and thus to make a new contract; which is to be proved partly by the written agreement, and partly by the subsequent verbal terms ingrafted upon what will be thus left of the written agreement."

The complainant, in this case, does not seek to vary the terms of the written contract, by proving that at the time the promissory note was made payable, on the 1st of October, 1858, ten months after date, the parties agreed verbally that it should be payable in eight months, or twelve months, after date. On the contrary, that note is the foundation of complainant's suit; he admits it in all its terms as fully as the respondent does, but claims that just before the note fell due according to its terms, the respondent requested its extension or renewal, and that they entered into a new verbal agreement to extend the loan, by postponing the time for the payment of the note, from the 1st of October, 1858, to the first of October, 1859. That a valid verbal agreement to that effect might be made, equally obliga-

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tory upon the parties as if made in writing, is, it seems to me, abundantly clear.

Whether the parties did, or did not, make such an agreement, is a question of fact. The evidence touching this question is, on the part of the complainant, clear and precise; while on the part of the respondent it is indefinite and conflicting. On the whole, the weight of evidence seems to me clearly in favor of the complainant, and I must therefore regard the alleged agreement as proved.

This being so, it becomes unnecessary for me to examine the point raised, as to whether or not the offer of payment, made by respondent on the 27th of November, 1858, was a legal tender; because, while the complainant, by his agreement to extend the loan to the 1st of October, 1859, bound himself not to enforce payment of the note before that time, he was not, on the other hand, bound to receive payment sooner, if tendered to him. The one party had a right to the accommodation for which he had bargained, and the other to the full fruit of his investment.

There remain two questions, as to the amount of interest which the complainant is entitled to recover. By the terms of the note the interest was payable quarter yearly; and the mortgage contains a covenant that, if the interest was not so paid, when due, the respondent should pay interest thereon, at the same rate as on the principal sum. But the respondent objects to paying compound interest, on the ground that no demand of payment of the interest quarterly has been shown by the complainant. In my opinion the objection is sound. I do not consider the complainant entitled to claim compound interest, as for a breach of the covenant contained in the mortgage, unless he proves such breach by showing a demand, and refusal or neglect, of payment. And no such demand is either alleged or proven. By neglecting to make demand as the interest fell due, he has waived his claim to compound interest. (See *Hastings vs. Wiswall*, 8 Mass. Rep., p. 455.)

The other question touching the subject of interest is this: is the respondent bound to pay two per cent. per month interest, for the time during which the loan was extended by verbal agreement, subsequently to the 1st of October, 1858? The

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respondent's counsel contends that he is not, because, by the statute law which was in force at the time when this contract was made, every contract to pay a higher rate of interest than twelve per cent. per annum, must be in writing and signed by the party to be charged therewith. (Statute Laws, vol. 1, pp. 186, 187.) Complainant's counsel argues that this defense cannot now be raised, inasmuch as the respondent was bound to have pleaded the statute in his answer, if he intended to rely upon it. But I cannot see the force of this objection. For, in an action at law upon the note, under our system of pleading, respondent might have advanced by way of defense, any matter of fact or of law, under a plea of the general issue, and would not have been required to plead the statute specially.

This defense raises a question of considerable nicety, which has never yet been settled in our Courts. I am free to confess that, to my own mind, this question seemed at first a difficult one to determine ; but, after mature reflection, I have arrived at the conclusion that the respondent is liable for interest at the rate of two per cent. per month, for the whole period.

If no rate of interest had been expressed in the note or mortgage, it is clear the complainant, in an action for the money, could not have recovered interest at the rate of two per cent. per month, by proving that the respondent contracted, *verbally*, to pay interest at that rate. He must have shown a written contract to that effect ; or been content to recover only the rate of interest allowed by the statute. But that is not this case. Here, the respondent, by the promissory note, did contract, in writing, to pay interest at two per cent. per month on the loan. And now the question is, did the subsequent verbal agreement, when the loan was extended, that the interest should continue to run at the same rate as previously stipulated, carry forward the operation of the original written contract to pay interest at two per cent., in the same manner that the verbal agreement to extend the time for paying back the loan, made the respondent's promise to pay on the 1st of October, 1858, as evidenced by the note, in effect, a promise to pay on the 1st of October, 1859 ? I think it did.

This suit embraces but one contract of loan between the parties. There has been but one borrowing and lending. The

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verbal agreement for an extension of the credit beyond the 1st of October, 1858, did not create a new borrowing and lending. When the respondent received the complainant's money, on the 1st of December, 1857, he stipulated in writing, to pay as a consideration for the use of it, two per cent. per month interest up to the 1st of October, 1858, when the principal sum was to be repaid. As that date was approaching, the respondent desired to have the use of the money, upon the same terms, for a year longer, to which the complainant assented. No new note or mortgage was given. There was simply an extension of the existing loan, the contract for which was evidenced by the note and mortgage previously given. A fair construction of the agreement seems to me to amount to this: the respondent agreed that, in consideration of the complainant's agreeing to treat the note which was payable on the 1st of October, 1858, as not payable until the 1st of October, 1859, by forbearing to ask for the money sooner, he, the respondent, would regard his written contract previously made, to pay interest at two per cent., as a consideration for the use of the money, as continuing in full force during the extended time. This, it seems to me, brings the respondent's contract fairly within the spirit and meaning of the statute referred to. There is a contract in writing here to pay interest at two per cent. per month.

The matter will be referred to the Master to compute the exact amount due on the note and mortgage, allowing simple interest, and report the same for the information of the Court, preparatory to a final decree.

Mr. Montgomery, for complainant.

Mr. Austin, for respondent.

November 18th, 1859.

Foster and Johnson for Mandamus to Collector General.

SUPREME COURT—MANDAMUS.

IN THE MATTER OF THE PETITION OF DANIEL FOSTER AND WILLIAM HENRY JOHNSON FOR A MANDAMUS TO THE COLLECTOR GENERAL OF CUSTOMS.

GOODS landed from a ship, reported to be unseaworthy (under a permit from the Custom House), for the purpose of allowing a survey to be made on the ship, and the said goods, as well as the ship, being subsequently sold at public auction, without payment of duties:

Held, that the property being once legally in the Kingdom, forfeiture cannot attach it, and the title of the property not affected in the hands of innocent purchasers:

Held—That the transaction may be regarded as an incomplete entry, to be perfected when the sale has fixed the valuation.

In such a case the Collector can require security for the duties, whatever they may be, as ascertained upon subsequent enumeration and valuation at public sale.

A peremptory mandamus issued to the Collector General of Customs, who had refused to receive the duties tendered him by the purchasers of the hull of a vessel, sold in bond at public auction, and which had been seized as for a violation of the revenue laws.

ALLEN, C. J.

This is a petition of Messrs. Foster & Johnson for a mandamus to the Collector General of Customs, ordering him, on receiving the duties on the hull of a vessel called the "Morea," to grant a permit to them for the same.

They allege that they purchased said hull at public auction, in bond, and on calling at the Custom House and offering to pay, and tendering the duties, the Collector General refused to receive the same and grant the necessary permit; but on the contrary, has caused the said vessel to be seized as for a violation of the revenue laws.

The District Attorney, as counsel for the Collector General, has filed an answer to the foregoing petition, in which he says that, on the 27th day of October last past, the ship "Morea" was reported at the Custom House as unseaworthy, and that a survey was necessary, whereupon a permit was granted in words following, viz:

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" COLLECTOR GENERAL'S OFFICE, }
HONOLULU, October 27, 1859. }

" Permit Capt. Manchester, of the ship " Morea," to land from his vessel all her cargo, stores, etc., etc., in order to clear the ship for a survey. All spirits to be sent into the Custom House, and all articles landed to be returned on board, if the ship is repaired, or properly permitted, should she be condemned.

(Signed,) " I. BARTLETT, Deputy Collector."

That, in pursuance of said permit, the ship " Morea " was stripped, and all but her hull landed on the wharf, and that on the 14th of November the hull of the ship, with her tackle and apparel, and stores, and whaling gear, were sold at auction by John F. Colburn, an auctioneer, and delivered to the purchasers, who have taken possession of the same, without being entered and the duties paid, in accordance with the laws of the Kingdom ; whereupon, on the 17th of December instant, the hull of the said ship " Morea " was seized, as liable to forfeiture, the purchasers having commenced breaking up the same, to be sold for consumption within the Kingdom.

The facts as detailed in the petition are admitted to be true.

The proper permit was granted for landing the goods from the ship for a survey, but not for consumption, and if the case closed here, it would clearly be a case of smuggling. For although a person has a right to a permit for landing goods from a vessel in distress, he has no right to put them into market without an entry and payment of the duties.

But in cases of this kind, for the convenience of the parties, and for the ascertainment of the value of the property sold, it has been the custom to delay the entry till after the sale, and to make out the entry from the account of sales—and I infer that the same course was taken in this case from the fact that the sale of the property was made by a licensed auctioneer; and it is admitted that it has been the custom of the Collector to allow auctioneers, in cases of this character, to sell, and account to him afterwards for the duty. It is admitted that the Collector General witnessed the sale from the Custom House, and that one of his officers was a purchaser of some articles at the sale. The Collector General further says that about a

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fortnight after the sale he went to ask Mr. Colburn why he had not made his entry and paid the duties, and he said he had not sold all the things, that there was a sextant and a quadrant and some other things, and that when he had done so he would pay them.

For the convenience of the Custom House, as well as for the owners of the property, a sale of the property was permitted. The landing of the goods was therefore virtually approved as from the beginning, and if so, was there at this time any act of smuggling? There had not been any fraudulent concealment of the property, or any act done in contravention of the avowed practice and usage of the office; but on the contrary, a full compliance with all its requisitions. The property was then sold in conformity to law and usage, but the duties are not subsequently paid as they should have been, and now can this omission to fulfill the express or implied contract of payment of the duties taint the whole transaction as fraudulent *ab initio*, and subject the parties interested in said property to a forfeiture as for smuggling?

It will not be contended that this can be the case, for the property being once legally in the Kingdom, forfeiture cannot attach it. It is very clear that at the time of the sale the Collector did not entertain the idea that smuggling was being done; all was open and above board, and the whole transaction, I infer, met his approbation, till some days afterwards, when the duties were called for and payment not made.

The payment of the duties had become a matter of contract. But it is contended that it will occasion great inconvenience if the Collector is forced to the rigid rule of compelling entries at once in cases of this character; this may be, but unless he has security for the payment of the duties, before the property is out of his possession, he runs the hazard of loss. Look at the consequences to the purchaser at a public sale, when the Collector acquiesces in its validity, and virtually agrees that the entry may be made and the duties paid afterwards, as by custom and usage appertains, but subsequently, on ascertaining the bankruptcy of the person on whom he relies, re-asserts a claim in the property, even to forfeiture. I hold that the property once legitimately went into the market,

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that whatever of dishonor or of negligence the parties may have been guilty of in the non-payment of duties according to the understanding, does not taint the transaction itself, so as to affect the title of the property in the hands of innocent purchasers.

This case is somewhat different from that of a regular importation, when all the pre-requisites to landing may be performed; for, in the first instance, the landing in cases like this must take place without them, for here the goods were landed for a survey and not for sale, and a permit given for that purpose. So, goods wrecked on our shores may be taken away, or may enter into the consumption of the country; and if they do, duties are to be paid; it is not at all strange that a delay for an enumeration and valuation by public sale should be made with the approbation of the Collector. It only requires on his part security for the duties, whatever they may be.

It is a sound legal principle, that a forfeiture can only be applied to those cases in which the means that are prescribed for the prevention of a forfeiture may be employed. (*Priest vs. Ware*, 2 Curtis, Decisions of the Supreme Court, U. S.)

Can any one doubt that the entry would have been made and duties paid had it not been by the approbation of the Collector that this postponement was made to complete a perfect enumeration and to fix the valuation? The admitted usage in like cases, the acquiescence of the Collector in this particular case, as evinced by his witnessing the sale, which took place on the 14th of November; his call on the auctioneer for duties some two weeks afterwards; his delay of the seizure of the vessel till December 17th; and his virtual approval of the sale, by suffering the purchasers to remove all the property which they had purchased, consisting of boats, etc., etc., proves this not to be an exceptional case.

It is admitted that the business was done in the most public manner, and there is no pretense of any concealment in the case.

I do not intend to be understood that a custom has arisen obligatory on the Collector to bind him in cases of this character without an approval of the same course, as in this particular case; but where this is given, the non-fulfillment of the

Foster and Johnson for Mandamus to Collector General.

terms by the auctioneer does not work a forfeiture of the property in the hands of an innocent purchaser. It may be regarded as an incomplete entry, to be perfected when the sale has fixed the valuation, and to do this, a *bona fide* sale must be made, and if *bona fide*, the right of the petitioners to complete the entry and perfect the title is clear.

The petitioners present a still stronger case, for the hull purchased by them was sold in bond, and they have tendered the duties and are now ready to pay them. It would certainly be a serious case for purchasers under the circumstances in which this sale was made, to incur a forfeiture of their entire purchase, because the duties have not been paid on other articles, sold at the same time, belonging to the same owners. Practically it would be as oppressive as the seizure of goods in the hands of innocent purchasers, when the importer had given security for the duties, which subsequently proved worthless.

I exceedingly regret that the Collector, after extending such kindness and courtesy in the administration of his office, should be subjected to the hazards of a loss, still it is less to be deprecated than the forfeiture of the goods of innocent purchasers at a public sale, when occasioned by the liberal administration of his office. Taking all the circumstances into consideration I am of opinion that the petitioners have not incurred a forfeiture, and are entitled to the possession of the property on the payment of the duties.

The Court, therefore, order a peremptory mandamus, directed to the Collector General of Customs, to be issued.

Mr. Harris, for the petitioners.

Mr. A. B. Bates, for the Collector of Customs.

December 22, 1859.

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SUPREME COURT—IN BANCO.

KALAMA vs. M. KEKUANAOKA AND JOHN Ii, GUARDIANS OF VICTORIA KAMAMALU.

THE certificate of an award of the Land Commission, with its accompanying survey, are admissible in evidence, and when they appear to be genuine, are *prima facie* evidence of the right of the party in whose favor the certificate is issued.

The term "Kuleana noho pa," as used by the Land Commission, means nothing more than a right of residence during the life time of the party in whose favor the award was made.

The plaintiff originally presented a claim in her own name, but declared that she had no right in the land, being merely an occupant under the real heir. The Board granted an award to the latter, with the knowledge and acquiescence, as it appeared, of the plaintiff; upon an action brought, after the lapse of many years, to recover possession of the land, it was held she had no title in the premises, although her name, as owner or grantee of the lot, was incidentally used in the records of the Land Commission to designate the part where the heir should have his right of residence.

The decision of the Court was delivered by Judge ROBERTSON as follows :

This is an action of ejectment, brought to recover possession of a piece of land, or house lot, situated near the Fort, in Honolulu. The parties waived the right to a trial by jury and submitted the case to the decision of the Court, so far as the title to the land is concerned, and consented, for the sake of convenience, that judgment on that point might be given during the vacation, as of the last term, and that, if necessary, the question of damages should be submitted either to a jury or to referees.

The plaintiff alleges that the land was awarded to her by the Board of Commissioners, to quiet land titles, on the 8th of May, 1848, and produces as evidence of that fact a copy of the adjudication of the Board on Claim No. 14, covering the lot in question, which copy purports to have been made on the 7th of July, 1852, by C. Kamaio, one of the clerks of the Board. The defendants admit that they are in possession of the prem-

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ises, but deny that the land was awarded to Kalama, or that she has any right or title to the same, and produce in evidence the records of the Land Commission, together with the original certificate and accompanying survey, usually delivered to claimants after the award was made by the Board, which certificate is signed by Kaehu, one of the clerks, dated the 14th of April, 1847, and certifies that a *kuleana noho pa*, in the lot in dispute, had been awarded to Kailio. The words *noho pa*, which occur twice in the certificate, are in the handwriting of Mr. Smith, the Secretary of the Board.

On referring to the Land Commission books, I find at page 23, of vol. 1, Register of Natives' Claims, Claim No. 14, Kalama presented to the Board in March, 1846, in which the plaintiff states that, on the 9th of March, she had been deprived of the possession of the house lot on which she alleges she had lived since the year 1816, and requests the Board to take cognizance of her case.

It appears that the land from which Kalama had been ejected is a portion of certain lands, afterwards known as Fort Lands, which were set apart, by Kaahumanu 1st, for the use of the military, when Liliha was deprived of the governorship of Oahu. It was accordingly claimed by Governor Kekuanaoa, before the Land Commission, as part of the property of the Hawaiian Government under his charge. The Land Commissioners had several hearings on the claim, and in April, 1847, made up their decision upon it, which decision is recorded at pages 79, 80 and 81, of volume 1st of Awards. After giving a summary of the case, and of the evidence, the Commissioners say, "Nolaila, ua maopopo keia. No ke aupuni ke kuleana nui ma ia pa. He hapakolu ko ke aupuni, e like me kona hapakolu iloko o na aina a pau, a no ke aupuni hoi ka lua o ka hapakolu i wahi e noho ai ke kanaka o ka papu. He kuleana alodio hoi ko ke aupuni, a pela hoi makou e hooko nei. No ke aupuni no ia pa. Ia Kailio nae ka noho pa e like me ka hoomalu ana o ke Kumukanawai." To this decision is annexed a survey of the entire lot, by metes and bounds, the bill of costs to be charged to the Government, and the signatures of the Commissioners.

It is contended by the counsel for the plaintiff that the Land Commission, by this adjudication, declared two-thirds of the

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land to belong to the Government, and the remaining third to the adverse claimant. It is not absolutely necessary, perhaps, to the decision of the present action, that the Court should determine what was the precise nature of the right reserved in favor of the adverse claimant, as against the Government, the main question being, was that right, whether a fee simple, a thirty years' freehold, or a life interest, awarded to Kalama, or to Kailio? But, as the expression of an opinion upon the collateral question will tend to render my decision of this case more easily understood than it otherwise would be, I shall give my opinion upon that question. I distinctly understand the judgment of the Land Commissioners to be, that the entire lot of land embraced in Claim No. 14, belongs by an allodial title to the Hawaiian Government; but that the adverse claimant has a "kuleana noho pa," in said lot. This is clear from the words used by the Commissioners: "No ke aupuni no ia pa. Ia Kailio nae ka *noho pa* e like me ka hoomalu ana o ke Kumukana-wai;" from the fact that the survey annexed to the award, and which, in every case, is to be taken as a part of the award, is a survey of the entire lot; and from the fact that the certificate issued to Kailio on the 10th of May, 1848, distinctly states that the right awarded is a "kuleana noho pa," in the middle third of the lot.

But, says the counsel for plaintiff, a "kuleana noho pa," means a fixed right of residence—a right of residence for ever—in other words, it is equivalent to a fee simple title. The learned counsel is clearly mistaken, and has evidently been misled by the similarity between the expression here used, "kuleana noho pa," and the expression *kuleana noho paa*, a fair translation of which would be, a fixed or secure right of residence. The term "kuleana noho pa," as it was used in the Land Commission, describes a species of right which was recognized only in a comparatively few cases of claims for house lots, in Honolulu and other towns, and means nothing more than a right of residence during the life time of the party in whose favor the award was made. It imports a mere life interest which the party could not, by paying a fixed commutation to the Government, as in case of the common freehold awards, turn into a fee simple. This will appear by reference

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to the certificate presented as evidence in this case, in which the usual clause, giving the party the option of commuting for a fee simple title, is struck out.

Let us now proceed to the main question. Was the "kuleana noho pa," in one-third of the land, awarded to Kalama or to Kailio? It is argued, in substance, by the plaintiff's counsel, that the Land Commission records show the claim to have been presented by Kalama, in her own name and on her own behalf, and that by the final action of the Board, as recorded at page 178 of the first volume of Awards, the middle third of the land embraced in the controversy, was awarded to Kalama in her own name, without any reference to Kailio.

The Land Commission books do show that the claim, as originally presented and entered, purports to be the claim of Kalama. But on turning to pages 24 and 25 of the first volume of Evidence, where the testimony taken at the first hearing of the claim is recorded, under date of April 22d, 1846, the claim is entitled, "Helu 14, ka aina o Kailio," with the name of Kalama written over those words. It appears that in the course of the first hearing the Commissioners asked Kalama if she claimed to be the heir of her father, Kailio the elder, who formerly occupied the lot under Gov. Kuakini and Kinau, up to about the year 1840. Kalama replied that she was not the heir, but merely an occupant of the lot under Kailio the younger, a foster son of James Young Kanehoa, whom her father had declared to be his heir. The Board then passed a resolution to the effect that, as Kalama was not the heir of her father, she had no right to prosecute any claim to the land, but that if Kailio the younger, who was the real heir, should press the claim, they would attend to it. At pages 57 and 58 of the same volume, under date of June 16th, 1846, we find the testimony which was taken at the second hearing. The claim is here entitled, "Helu 14, Kailio." Following the Board in its course of proceeding, we come to pages 79 and 80 of the first volume of Awards, where we find the decision of the Board to which I have already referred. This decision is prefaced by a succinct statement showing the origin of the claim to be as far back as the year 1816, when the right of occupancy of the lot was given by the high chief Kalaimoku to Kahiamoe, a soldier, or officer of the

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fort, after whose time the lot was occupied successively by his brothers Holokualani, and Kailio the elder, both of whom were soldiers.

In the course of their summing up of the case, the Commissioners make the following statement, which has given rise to some discussion, viz: "ua ae mai o Kalama o Kailio ke keiki a Kahaanapilo ka hooilina, a ua koi mai oia i ka pa ma kona inoa, me ka ae mai hoi o Kailio, e like me kana i olelo mai ai imua o makou." The plaintiff's counsel says this means, in substance, that "Kalama has assented, or stated, that Kailio, the son of Kahaanapilo, should be her heir, and that with his consent she has claimed the land in her own name, as she stated in our presence." This is so evidently a bad translation that I shall not spend time in commenting upon it. I should say that, taking this passage in connection with Kalama's declaration that Kailio was heir to her father, made before the Commissioners on the 22d of April, 1846, to which it plainly refers, the meaning of it is this: "Kalama has admitted that Kailio, the child of Kahaanapilo, (Mrs. George Davis,) is the heir, and she has claimed the lot in his name, (or on his behalf,) with the consent of Kailio, as she has already stated in our presence." That this is the meaning of the Land Commissioners is clear, I think, from the fact that in their award, which was drawn up at the same time with the statement of the case, after declaring that the lot belongs to the Government, they say, "Ia Kailio nae ka noho pa," etc., that is to say, "to Kailio however belongs a right of residence," etc.; and also from the fact that, on the 22d of April, 1846, the Board had passed the resolution already referred to, declaring in effect that Kalama had no right whatever in the land, and that the claim must be prosecuted by Kailio, the real party in interest. But let us try another reading of this passage, and suppose it to mean that "Kalama has admitted that Kailio, the child of Kahaanapilo, is the heir, and she has presented the claim for the lot in her name, with the consent of Kailio, as she has already stated in our presence." Take this reading in connection with the declaration of Kalama, on the 22d of April, 1846, that Kailio, and not herself, was the real claimant, and in connection with the language of the Commissioners in giving their decision, that "to Kailio, however, be.

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longs a right of residence," and is it not clear still that the Commissioners regarded Kalama, not as representing any right of her own, but only the rights of Kailio?

The counsel for plaintiff, who has argued the case with great ingenuity and ability, contends further, that the final judgment of the Board upon the claim was not given until the 8th of May, 1848, after the division of the lot by referees, when the middle third was declared to belong to Kalama. The record of the division is found on pages 178 and 179 of the first volume of Awards. Page 178, which contains the report of the referees, and the consequent action of the Board, is headed thus: "Claim 14, Kalama he wahine, (Kailio) continued from page 79." Page 179, which contains the survey accompanying the division, is headed thus: "Helu 14, ko Kailio hapakolu," that is, "No 14, Kailio's third." After stating that the referees had exceeded their powers by setting apart the *mauka* third for the adverse claimant, and reserving the other two-thirds for the Government, when their duty was merely to divide the lot into three parts and report the division to the Board, the Commissioners proceed to say, "We therefore give to Kalama, not the *mauka* third, nor the *makai* third, but the middle third, as described in the plan hereto annexed." Here, says the plaintiff's counsel, we have the latest action, the final decision of the Board in the matter, which must be taken just as it stands, and if it appears here that the award was finally made to Kalama, that must prevail, whether or not it be in accordance with the comments of the Commissioners on the case, or anything else that went before. That there is great force in this argument cannot be gainsaid, and if this were, indeed, the judgment of the Land Commissioners, settling the rights of the respective claimants in the land, and defining the quality of the estate which each claimant had in it, the argument must prevail. But this is not the judgment of the Commissioners on the rights of the parties, for that judgment was rendered in April, 1847, more than a year previous to the division of the land by metes and bounds, as here recorded, which division was merely an incidental transaction necessary to carry out the award previously made, by designating the part of the lot in which Kailio should have his right of residence, and the fact that Kalama's name

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occurs here instead of Kailio's has no real weight. Further, the division of the land by metes and bounds was not the latest action of the Board in the matter, for after the division they issued, on the 10th of May, 1848, to Kailio, through their Secretary, as was usual and requisite in every case, a certificate stating that they had awarded to him a "kuleana noho pa" in the middle third of the lot as surveyed by G. Richardson.

The plaintiff's counsel objected at the hearing to the introduction of Kailio's certificate as evidence in the case, but the objection was overruled by the Court, for, in every case, the certificate of award with its accompanying survey, are admissible as evidence, and, in my opinion, when they appear to be genuine, they are at least *prima facie* evidence of the right of the party in whose favor the certificate was issued. Indeed, in some cases which have heretofore come before the Court, they have been the only evidence offered by such party. But, says the learned counsel, Kailio's certificate does not appear to be genuine—it is suspicious, being dated the 17th of April, 1847, more than a year previous to the final action of the Board on the claim.

The counsel for defendants having left the case on their part in the hands of the Court, without argument, I have been under the necessity, in order to meet the points raised by plaintiff's counsel, of examining closely the records of the Land Commission, and I find that the decision of the Board on the rights of the parties was made on the 17th of April, 1847, the date of the certificate, although the latter was not delivered till the 10th of May, 1848, after the division of the land. That the award on this claim was made on the 17th of April, 1847, appears clear from the fact that the award on Claim No. 11, and that on Claim No. 16, the first immediately preceding, and the last succeeding, this award on the record, both bear that date, and the same date is still visible at the end of this award in pencil mark partially effaced, in the handwriting of the Secretary. The certificate is therefore correctly dated.

After a careful investigation of all the evidence in the case, I am clearly of opinion that the award of the Land Commissioners was made in favor of Kailio, and not Kalama. As has been shown, the Land Commissioners, on the 22d of April, 1846,

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passed a resolution, based upon the deliberate declaration of Kalama herself, to the effect that she had no right in the land ; on the 17th of April, 1847, they decided that Kailio was entitled to a right of residence for life on one-third of the land ; and on the 10th of May, 1848, they issued to Kailio a certificate in accordance with that decision, which certificate the defendants now hold. Kalama has entirely failed to show any title to the premises, and therefore cannot recover possession thereof. After the passing of the resolution of April 22, 1846, by the Land Commissioners, Kalama was recognized by them merely as a sort of agent for Kailio ; and the only reason why her name appears in the records, after that date, is that the claim, which was in fact Kailio's claim, was originally entered in the name of Kalama. It appears evident to me that at the time the award was made to Kailio, Kalama was well aware of it, and acquiesced in it, and why she should now, after the lapse of so many years, set up any pretensions to a title in the premises, is more than I can comprehend.

Let judgment be entered for the defendants with costs.

C. C. Harris, Esq., for plaintiff.

A. B. Bates, Esq., for defendants.

N. B.—The above Decision appeared in the "Polynesian" of Feb. 28, 1857, and is here produced in consequence of being omitted under the above year.

SUPREME COURT.—JANUARY TERM—1860.

KAKE vs. C. S. HORTON.

WHERE the husband had come to his death by the wrongful act of the defendant, the Court was of opinion, that upon the construction to be given to certain provisions of the statutes of this Kingdom, and as consonant to natural law and reason, the widow could maintain an action on the case to recover consequential damages, resulting from his death.

The Court instructed the jury that the damages, if any to be awarded, must be based upon the plaintiff's loss of support, deprivation of society, etc., as measured by the husband's station in life, age, and ability of earning a livelihood.

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The plaintiff is the widow of Charlie (Pihaole,) late steward on the American bark "Frances Palmer," who is alleged to have come to his death by the act of the defendant. She brought the action to recover damages for the loss thus sustained by her.

The most important of the motions preliminary to the trial, was that to dismiss the cause for want of legal ground of action, which was debated at great length. The ruling of the Court, delivered by JUSTICE ROBERTSON, was as follows :

We are of the opinion that much of the law read by the learned counsel for defendant, as well as a great part of their argument, is inapplicable to the question at issue.

They treat the case as if this was an action of trespass brought by the plaintiff to recover damages for an assault and battery, committed on her deceased husband, Charlie Pihaole; whereas, as we understand the matter, it is an entirely different thing, being an action on the case, to recover for consequential damage resulting to the plaintiff by reason of the death of her late husband, which she alleges to have been caused by the wrongful act of the defendant, Horton.

The simple question is, can an action on the case be maintained in the courts of this Kingdom, upon the cause of action set forth in the plaintiff's petition? and if so, can such action be brought by the widow?

Whether this action can be maintained upon the grounds relied on in the present case, must, we think, depend upon the municipal laws of the country where the action is brought or of the country where the wrongful act is committed. In the present case the action is brought in the courts of the same country where the act which is said to have occasioned the death of plaintiff's husband is alleged to have been done.

By the Common Law of England, the action would not lie. In the case of *Baker vs. Bolton et als*, (1 Campbell's Rep., p. 494,) which was an action against the defendants as proprietors of a stage coach, on the top of which the plaintiff and his late wife were traveling from Portsmouth to London, when it was overturned, whereby the plaintiff himself was much bruised, and his wife was so severely hurt that she died about a month after; Lord Ellenborough, C. J., held that the jury could only

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take into consideration the bruises which the plaintiff had himself sustained, and the loss of his wife's society and the distress of mind he had suffered on her account, from the time of the accident until the moment of her dissolution. For that, in a civil court the *death of a human being* could not be complained of as an injury; and the damages as to the plaintiff's wife must stop with the period of her existence.

It is argued by counsel for the defendant, that the Common Law of England is in force in this Kingdom, and that therefore the action cannot be maintained in this Court. In our opinion, this argument is not sound. We do not regard the Common Law of England as being in force here *eo nomine* and as a whole. Its principles and provisions are in force so far as they have been expressly, or by necessary implication, incorporated into our laws by enactment of the Legislature; or have been adopted by the rulings of the Courts of Record; or have become a part of the common law of this Kingdom by universal usage; but no farther. The analogy sought to be set up between the Hawaiian Islands and the British Colonies in North America, (now a part of the United States,) with reference to the Common Law of England, is not, in our opinion, well sustained. We think the circumstances of the two countries are widely different.

Whether or not the present action can be maintained in this Court, depends upon the construction to be given to certain provisions of the Hawaiian Statutes.

The provision contained in the 1116th section of the Civil Code touching the institution of suits to recover damages for injuries direct or consequential is very general in its terms, as indeed such a provision must be, it being impossible for the Legislature to define and enumerate all the various causes for which an action of trespass, or an action on the case, will lie. Such causes are illimitable in their variety. And as has been repeatedly remarked, it is by no means a conclusive objection to an action on the case to say that an action never was maintained for the same cause before. When an action is brought under the general provision referred to, the question whether or not that particular action will lie is a matter for judicial determination, not certainly according to the mere whim or fancy of the Court or Judge, but in accordance with legal principles.

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It is provided in the 14th Section of the Civil Code, which forms a part of the Chapter on the Construction of Laws, that in all civil matters where there is no express law, the Judges are bound to proceed and decide according to equity, applying necessary remedies to evils that are not specifically contemplated by law, and conserving the cause of morals and good conscience. And, to decide equitably, an appeal is to be made to natural law and reason, or to received usage, and resort may also be had to the laws and usages of other countries. We think reason and natural justice are clearly in favor of permitting an action to be maintained, upon the grounds relied upon in this case, and upon a resort, for light, to the laws of those countries, to whose authority and opinions we yield the highest veneration, we find that the old harsh rule, which had its origin in feudal times, has been superseded by liberal statutory provisions, more in accordance with justice and with the sentiments and circumstances of an enlightened age. As we are not fettered by the English Common Law rule on the subject, no legislative enactment is required to remove that obstacle to the maintenance of an action like the present in a Hawaiian Court, and we think it ought to be permitted, as being consonant with natural law and reason, as well as with the laws of civilized countries.

In the case of *Carey and Wife vs. Berkshire R. R. Co.*, 1 Cushing's Rep., page 480, Metcalf, J., intimated an opinion that by the Civil Law, and by the law of France and Scotland, whose jurisprudence is mainly based upon the Civil Law, actions like the present could be maintained. We regret that we have not had time to verify, by reference to the books, the opinion of so respectable an authority, because this would of itself afford a distinct and sufficient foundation for our decision. The several Courts of Record having the power, under the 823d Section of the Civil Code, which is not a new provision in our Statutes, but one which has been repeatedly acted upon by this Court, to cite and adopt, at their discretion, the reasonings and principles of the Common Law, or of the Civil Law, so far as the same may appear to the Court to be founded in justice, and not in conflict with the laws and customs of this Kingdom. If, as is intimated in the case just referred to, the principles of the

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Civil Law would permit the institution of such an action as the present, we have no hesitation in preferring the doctrine of the Civil Law to that of the English Common Law upon this point, for we conceive the former to be pre-eminently "founded in justice."

The principle which we now recognize will become, by judicial adoption, a valuable part of the Common Law of this Kingdom.

With regard to the objection that this action must be brought by the executor or administrator of the decedent, we think such an objection applies merely to the form of enforcing the remedy, and not to the merits of the claim, or the principle upon which it stands. We have some doubt whether, under our statute of practice as it reads at present, an administrator could maintain the action, as such. The provision of the English statute referred to (9 and 10 Vict.) requiring the suit to be brought by the executor or administrator is evidently intended for convenience and to prevent a multiplicity of actions. But the damages recovered in such actions are not general assets in the hands of the administrator, being for the *individual* benefit of the widow, or other party entitled thereto; and it does not appear by any means *indispensable* that the suit should be brought by the administrator. We think the suit in this case is well brought by the widow.

Motion denied.

R. G. Davis and John Montgomery, attorneys for the plaintiff.

The jury, as finally accepted, after numerous challenges for cause, consisted of a mixed jury, half foreigners and half natives.

The marriage of Kake with the deceased Charlie was proved by Rev. Lowell Smith, who performed the marriage ceremony, and by a native who witnessed it.

Horace Crabb sworn, deposed—Was customs officer on board "Frances Palmer." Defendant was mate; Capt. Paty was master. The Captain was, generally speaking, on board except when business called him away. He did not sleep on board,

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but was always there in the morning. Heard Horton say to Charlie, "When he was not there to keep supper for him; if he was not going to be there, he would let him know." He was on the poop-deck at the time; Charlie was standing a little lower down, and made no reply that I heard. Charlie descended to the cabin and Horton shortly followed. Horton came up again by the after gangway; next saw Charlie lying on the main deck, near main hatch, his head supported on his father's knee. I heard something like a blow and a fall before I saw him lying on the scuttle. Heard Horton make a remark as he was walking aft, saying, "You'll know better next time, you son of a b——."

Joseph Ellis sworn—Visited Horton at the vessel the said Sunday afternoon. Horton, Crabb and self were on the poop-deck smoking; saw Charlie at stern of vessel shaking table cloth, and then go below. Horton told him not to have supper till five o'clock. Charlie came up again five minutes afterwards on the gangway leading up from main to poop deck, on side next to wharf, and said it was his orders to have supper at five o'clock. Heard him mumble something else, but did not understand what he said; then saw Horton go towards Charlie and kick him; the kick was upon the head. He said, "You will," and kicked him. Charlie disappeared below; about fifteen minutes after saw Charlie; Horton told me to go for a doctor. He said, "I have hurt that boy; I wish you would go and get a doctor." Cannot say if I saw Charlie dead or not.

Orlando H. Houston sworn—I was employed on board the "Frances Palmer" in October last, by the cook, the afternoon of the 16th. Saw Horton kick Charlie that evening, I should say on the side of the head. Charlie was on the steps on the starboard side of the vessel. The stairs lead from the main deck to the poop. Horton was on the poop when he inflicted that kick. I heard Charlie say that he wanted to get through his work before night, and he was going to. Horton stepped forward and said, "You will, you son of a b——," and inflicted a kick. Charlie fell down upon the deck; he never rose again. There was no ring-bolt where his head struck; it was six or eight inches from where his head struck.

Cross examined—I was standing on the starboard side of the

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vessel, about two feet forward of the after part of the house; did not see Charlie come up; he was on the steps when I saw him; should say he was standing with his foot on the second step from the top, in the attitude of coming down; his shoulder was just above the combing of the hatch; he was stooping. There is an iron railing there; his hand was not on it. Do not know where his hand was, etc. Has been previously examined in this place, also before coroner's jury; part of testimony there given he had heard read, part not, and had signed it so. Saw Ellis on the poop-deck of the vessel; think he was nearer to the scuttle-way than I was; should think the bench he sat on was forward of the mizzen rigging, on the side opposite Charlie, on the port side the skylight. Horton struck Charlie on the right side of the head, or somewhere in the neighborhood (of the head.) He had no where else to kick him; he kicked him in the neck—not sure whether in the neck or head; he could not kick him anywhere else than on the right side of the head. I am not aware that I swore he kicked him on the right side of the head. The left side of Charlie was turned to me. Anybody standing aft could have seen better than I did. Charlie was in attitude of coming down; he fell bodily all of a heap, and struck on the deck on his posteriors. His face was towards the wharf, the starboard side. I was coming aft at the time; I stood on the same spot as when I first saw him kicked; stopped there when I saw him fall; he fell over backward, after he came down on his posteriors. Horton used the words, "You will, will you, you son of a b——," as he raised his foot to kick him. Horton was facing forward. I was first one who approached him when he fell.

By the Court—His face was towards the wharf when kicked, his right side toward Horton, his left side toward me; I could see his head, and part of his shoulders was a little above the beam.

By a Juror—Horton was facing the bow of the ship.

Dr. C. F. Guillou sworn—Assisted at post mortem examination of body of Charlie. There was considerable extravasation of blood about the base of the brain and the upper portion of the spinal column. There was dislocation of the spine of the third vertebra; the displacement about a half inch to the pa-

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tient's right of a straight line along the other vertebræ. We concluded death had been caused by the injury of which I have given the description. I examined the pupils of the eyes; they were dilated in an unnatural way. I concluded from that there was oppression of the brain. The extravasation of blood appeared to be very recent; I thought it was less than a few hours; it might have been produced by an injury inflicted about two or three hours previously. My conclusion was, from the examination, that death was caused by an injury received some few hours before by a blow or violence applied to the back and side of the neck in the vicinity of the third vertebra from the left side, and a position somewhat behind the person receiving it. The vertebra was dislocated to the right. The injury was not likely to result by a person falling down, unless he struck; it might have been caused by a blow on the right side of the head, which caused the head to strike against something hard on the other side. The injury might have been produced by the application of a hard body, not exceeding an inch and a half, applied on a line with the third vertebra from the left side, or somewhat behind, passing towards the right. It need not have had any inclining motion at the time. The direction applied to the blow refers to the perpendicular action. The hard substance might have been stationary and the body moving, and the effect in question produced. The dislocation and extravasation could not have occurred without the application of some external force. From the nature of the extravasation, it must have occurred within a few hours.

Cross-examined—It would not necessarily require a violent blow; it would depend upon the muscular state of the person; if the muscles were taut, they would resist the blow; if slack, be more easy to dislocate. If muscles are relaxed, they form no resistance; if taut, they do. A blow on the right side of the head alone would not make the dislocation spoken of. That is my professional opinion. There was no discoloration on the right side of the head. There was no evidence of any blow by a raising on the right side of the head. There was no indication of injury necessarily applied on right side of the head, but the effusion of blood in that region might have come from laceration of blood vessels lower down. When a man is stand-

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ing, the muscles required therefor are contracted, the others relaxed. In a state of intoxication muscles are very apt to be relaxed.

H. L. K. Wood testified—That he was sitting on the deck at the time of this occurrence, and that he heard Horton say very kindly to Charlie, that he did not wish him to place supper on the table until he came on board ; if he were intending to be absent at supper he would always let him know of it ; that, presently, Horton went down to the cabin and returned to the deck again, followed up the same gangway by Charlie. Charlie said his hour for supper was five o'clock, and if he was not there, he would have to go without. Horton asked him what he said, and he repeated it. Charley was looking directly over the side of the vessel, standing on the stairs, about down to his shoulders. Horton, after he had asked him what he said, stepped forward and struck him with his foot on the right side of the head ; his head struck against a beam, on the upper part of left ear, and he disappeared from my sight. About three minutes afterwards I saw him lying on the deck, with his head over the combings of the main hatch, supported by some person and restoratives being applied. Horton sent me for a doctor.

In the cross examination, witness said : Charlie spoke in a commanding voice, rather as if he were giving orders to Horton than *vice versa*. Horton struck him with the inside of his right foot, balancing himself upon his left leg, and across his left foot. The steward repeated his expression after Horton asked him what he said. Horton spoke to him in a manner to call the steward's attention to his being outside of his duty—i. e., insolent.

Dr. S. P. Ford sworn—Made a post mortem examination of Charlie at the station house, on a Sunday evening in October. I advised them not to hold the post mortem that night, but at 9 o'clock, P. M., they sent for me. It has always been the custom, so far as my experience goes, to let the body lie until it is cold; while the blood is fluid it is embarrassing.

Question—If the examination had been postponed until the body got cold and solid, would or would not extravasation of blood from external injuries have been more easily discovered ? (Objected to. Judge Allen ruled that a medical man might

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give his opinion upon a given state of facts. Judge Robertson thought the objection good.) Extravasation would not appear until the parts became rigid perhaps. Discoloration depends upon state of the patient. Should think in such a subject as Charlie, discoloration would take place in from six to twelve hours; it is impossible to tell. The pupils of the eyes were dilated to the full extent; it indicates oppression or injury of the brain. I removed the scalp and found no extravasation of blood. I examined the upper part of the skull. I removed the top of the skull and found extensive extravasation in both temporal regions—more on the right. We thought at first it was rupture of the meninge artery, which it proved to be on examination. We thought that sufficient cause to account for the death—were about to discontinue examination any further at the time. I then suggested the removal of the brain from the base of the skull, and found a large amount of extravasated blood at the base of the brain, with the same appearance following down the spinal marrow. This appearance induced us to extend the examination still further. On laying the spinal column of the vertebræ bare, we found the third vertebra of the neck dislocated to the right side, about half an inch from the medium line of the process of the other vertebræ; there was no appearance further than that; we extended the examination no farther. The rupture of the temporal artery was sufficient to cause death; * * * any violent falls or blows would produce such dislocation; it is not a difficult one; muscular action would, if sufficiently powerful, throw it out—any sudden jerk. I should not think it would produce this dislocation. I should not think that a blow on the left side of the head, against a beam, would cause the dislocation; it must have been something coming in contact with the lever of the bone. Injuries to the head are curious in their effects. Blows may be received on one side of the head and produce injuries on the other side, which is a very common occurrence. It does not require a very heavy blow in the temporal region, as a general thing, to produce a great deal of injury—the skull being very thin and nearly flat. I have no way of telling how heavy the blow was; it would depend upon the force used whether a kick as described would be sufficient to produce the

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dislocation ; not having seen the blow I cannot judge. I was acquainted with Charlie three or four years ; he served me more or less for three or four years ; he was the best servant I have ever had, etc. ; know not why he should not have attained the average age of natives. It is difficult to tell that average ; should think it would be thirty-five to forty.

Cross-examined—There was a rupture of the temporal artery on the right side ; I am sure it was so ; it is not necessarily the case that the brain should be injured at the point where the hit is. The particular injury would have accounted for the extravasation, if we had not made examinations as we went along. We were satisfied in our own minds that was sufficient. The injury at the base of the skull would account for the extravasation. The extravasation in the temple appeared to be confined to itself ; a blow on the neck would not account for the extravasation on the head ; a blow on any portion of the head would account for the extravasation. The dislocation of the vertebræ was sufficient to have caused the death ; that injury was the cause of the death. The injury upon the third vertebra was the cause of the death of Charlie, in my opinion ; he never had the venereal to my knowledge while he was with me. His wife was never treated by me for venereal disease.

By Mr. Montgomery—If there had been no injury to the vertebra at all, the extravasation of blood from the meninge artery in the temporal region, would have caused the death.

By Mr. Harris—I swore in a previous case, that I concurred with what Dr. Guillou had stated, and that I had nothing to add to it. The death might have resulted from the extravasation, and the dislocation have taken place after the body fell. He could not have dislocated his vertebræ by falling on the flat deck ; the head striking the deck, the concussion might cause the dislocation.

By a Juror—My opinion in my former examination at the coroner's jury was, that the kick was the cause of the death. A man could kick strong enough to cause the death.

W. C. Parke sworn—I hold the office of Marshal of the Islands. I know the defendant ; I recollect the Sunday Charlie came to his death. I had an interview with Horton that evening between six and eight o'clock ; he came to my house in the valley,

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near church time; he came into my house in a very excited manner, and said he had killed one of the hands on board the "Frances Palmer," and had come to deliver himself up to me. I saw he was excited, and then I asked him if the man was dead; he said he did not know, but he supposed that he was. I then asked him who it was, and he said it was Charlie, the steward. I then left the house in company with him and proceeded to the prison and locked him up. On my way down I asked him how it took place. He said he had been out that afternoon making visits to some of his friends, and upon returning he found the supper table cleared away; he said then he called the boy Charlie, and told him in future not to clear away until he returned, and told him to get him some supper. He said the boy used very insulting language to him, which made him angry and that he kicked him in the head. I asked him how he could kick him in the head. He answered that he was walking on the poop-deck, walking fore and aft, and that the boy came up upon the stairs from the lower deck, and was standing on the stairs at the time that he kicked him. I asked whether the kick or the fall on deck killed the boy. He said he didn't know. He said he did not suppose he had killed the boy, that he went for a doctor, and had applied hartshorn himself. He appeared to feel bad, and said he had no intention of hurting the boy.

Cross-examined—He came voluntarily to my house.

Elemakule sworn—Said he knew that the deceased had lived amicably with his wife, and provided well for her support at all times. Two other native witnesses testified to same effect. *Governor Kekuanaoa* testified the signature of Keaukai to the marriage license of Pihaole and Kake. *Dr. Judd* testified his opinion that the average age of natives is 35 years, if they reach the age of 22 or 23 in good health. *W. F. Jourdan*—Had seen the plaintiff and her husband walking and talking together. Had seen them on board ship.

P. S. Wilcox—Was slightly acquainted with Horton; Horton had asked him the other day if there was any part of the "Comet" for sale. Didn't know anything about Horton's property.

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A. N. Clarke—Horton had told him that he hoped at some time to be captain of a ship of which he had a part interest.

Horace Crabb deposed he had seen Charlie take drinks that Sunday afternoon, etc.

The plaintiff here rested, and the defense was opened to the jury by Messrs. Harris and McCully, the final argument for the defense being made by J. D. Blair.

The defendant called *Wood* to show that Charlie had bottles of spirits, and invited his friends to drink that afternoon; and *Capt. Smith*, that Charlie was addicted to drinking to a degree that he was not trustworthy.

Dr. C. F. Guillou sworn—I remember substantially the facts upon which my evidence was given in the former case. I am willing to swear to them as facts. The injury, as evidenced from the examination must, in my opinion, have been applied to the left side and somewhat from behind, in the region where the head and neck meet. There was no bruise or superficial injury either on the head or neck. The effusion of blood about the brain might have caused death, but the injury of the neck, the dislocation, would then have been omitted in the estimate of causes, and is itself a sufficient and more constant cause of death than the effusion alone. There was no abrasure about the head or neck externally, nor any bruise internally; upon removing the skull-cap the effusion of blood was observed in both temporal regions, beneath the *dura mater*, and apparently in its tissue. In opening the *dura mater* and raising the brain, a large quantity of blood was found about the base of the brain and the opening of the spinal column. The *dura mater* is a thick membrane that covers the brain. I looked for rupture of the meningeal artery, but was unsuccessful in finding any. The meningeal artery runs between the skull and the coverings of the brain, and sends small branches for the nourishment of both of them into their respective tissues. Although there was dislocation of the third vertebra, there was no thickening or apparently unnatural growth about the dislocated part or those adjoining, and this absence induced me to conclude the injury to be recent. The blood effused about the base of the brain might be caused by the same injury as produced the dislocation of the neck. There was no bruise externally or internally on



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that side of the head. The dislocation is the greatest of the manifest causes of death, and therefore the most probable one.

Cross-examined—I discovered, upon removing the blood, considerable extravasation of blood in both temples. The discoloration from presence of blood beneath or within the *dura mater*, extended some distance above the line at which the separation of the skull was made, say an inch or inch and a quarter, with indistinct edges. The thickness of the layer of blood was not estimated; the *dura mater* was opened in search of the effusion; the quantity of effusion was sufficient to cause death, if nothing else had been found. Effusion seldom occurs without shock, nervous shock; slight effusion may accompany and fix the fact of shock. The bone at the temporal region is thinner than the other part of the head—the thinnest. The temporal bone is very complex; there is a flat portion to it in the region commonly called the temple. From the thinness of the bone and flatness, a greater injury is more easily inflicted upon that part of the head by the same force than on any other; a slight blow might cause effusion of blood internally. I did not find a ruptured vessel at all. Dr. Ford and I concurred in all the results that we arrived at in this examination, to the best of my knowledge. I have never seen or heard Dr. Ford's testimony, but we had a conversation over the body. I was requested to give my evidence first, and having other occupation, then left the room. I found no rupture in the temporal artery, nor did Dr. Ford in my presence; the temporal artery is outside the skull, and no injury was, to the best of my knowledge, observed outside the skull, therefore, no injury of the temporal artery was observed or probably existed. The meningeal artery is a branch of the internal maxillary, as my memory is, and not of the temporal artery. It would be proper, in common parlance, to call the meningeal artery in the neighborhood of the temple. The post mortem examination occurred from three to four hours after the death. Had there been contusion, bruise of the soft tissues, the discoloration or the evidences of it, would have been more manifest several hours afterwards, particularly if, on that part of the body which was undermost in the position in which the body was lying or might continue to lie after death. I have no distinct recollection of any verbal concur-

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rence in such opinion by Dr. Ford. If Dr. Ford said he had found a rupture of any blood vessel in my presence, I should think it incorrect on that occasion. Extravasation means an escape of blood from the vessels naturally containing it; it is blood outside the vessel; it may get out by exudation, but the quantity observed here justified the supposition of laceration or bursting, and under that impression I sought for the injured vessel, but did not find it. The extravasation must have been caused by an injury inflicted within a few hours previous, from the condition of the blood and brain.

By Mr. Blair—The extravasation of blood about the base of the brain might be caused by the same injury that produced the dislocation. The skull is thick on the side of the upper part of the head; it is thick and arched and capable of resisting.

Mrs. A. P. Everett sworn—In a trip on the "Frances Palmer," Kake on board, Kake had told her in reply to inquiry, that Charlie used to strike her, and once when he struck her she lost her eye a few days after in consequence. Inquired if he was in the habit of striking her often, and she said yes; she intimated to me that her husband was not very kind to her.

Cross-examined—She told me she lost her eye after her marriage with Charlie.

Miss Fanny Paty—Made the passage at same time with preceding witness. Kake told me that Charlie had given her a knock on the back of her head, so that she lost her eye. That is the only time that I gathered from her that he had beat her, that she was made insensible by the blow.

Cross-examination—Kake did not say how long after her marriage it was, or whether it was, before or after marriage.

F. L. Hanks sworn—Charlie had told him that he put out Kake's eye.

Cross-examined—I have no idea whether he said it was before or after marriage.

H. T. Fitch sworn—Testified that in his opinion Charlie was "tight" on the noon of said Sunday. *Capt. Smith* knew that Charlie would not have been insolent when sober. *Rev. Lowell Smith* recollected distinctly that, when he married Charlie and Kake, she had a handkerchief bound over one eye—couldn't say

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which one. *W. E. Cutrell* and *Daniel Burns*, saw Charlie on said Sunday afternoon; thought him sober. *Jacob P. Manuel*, saw Charlie on said Sunday afternoon; thought him sober. Kake's eye was out in December, 1854. (The marriage was February 13, 1855.) *Elemakule* and *Kui* swore Kake's eye was injured before her marriage.

The Court, per Justice ROBERTSON, charged the jury in substance as follows :

This is not a re-trial of the case of *Rex vs. Horton* for manslaughter. The issues in the two cases are somewhat different, and so are the rules by which the two cases are to be decided.

There are three principal questions in this case :

1. As to whether or not this action can be maintained in law. This is a question for the Court, and has already been decided in the affirmative. This is said to be a novel case; and so it is in the Courts of this Kingdom. But in the Courts of those countries to whose judicial decisions we are accustomed to look with veneration, such actions have ceased to be novel. True, by the Common Law of England, the action would not lie, for, as Lord Ellenborough, C. J., said, 1 Campbell's Rep., "The death of a human being could not be alleged as a cause of action in a civil court. But the law of England in regard to this matter, has been altered by statute; and the change thereby introduced has been adopted in several of the United States. As an illustration of the principle upon which this action is founded, I may suppose the case of the widowed mother of an only son, upon whose exertions she is dependent for her subsistence; and suppose that her son comes to his death by the wrongful or reckless act of some third party, thereby causing the mother to lose her support, shall she be left to pine out the evening of her days in sorrow, and, it may be, in poverty and want, without redress? It seems to me that if any one in the world has a good claim for reparation it is such a mother. And is not the claim of a widow for the loss of her support analogous to that of a mother?"

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2. The first question for you to consider is, has the plaintiff made out a case entitling her to a verdict for damages at the hands of the jury.

And this involves several subordinate questions. [Here the Judge repeated in substance the evidence touching the occurrence which ended in Charlie's death.] Was Charlie's death caused by the act of Horton; intentionally or unintentionally? It makes no difference which, if unjustifiable. It is said on the part of the defendant, that he was administering deserved chastisement to the steward. There can be but one opinion in the Court or the jury-box, in regard to the authority of masters and officers of ships. It ought to be sustained to the full so far as the exigencies of the business in which they are engaged render it necessary. But their authority must be exercised with prudence, and as much care as circumstances will admit. They are entrusted with large authority, and the responsibility attending its exercise is commensurate with its extent. There is a great difference between a ship at sea and a ship in port. If the crew or a part of the crew of a ship at sea should mutiny or refuse to do their duty, it might be the right and the duty of the master and officers to compel obedience at all hazards. But in the case of a ship lying quietly in harbor, if the crew should refuse duty, the master and officers may not enforce obedience to their orders by force of arms. They must seek another remedy. In this case the "Frances Palmer" was "tied up" at the wharf. Were the circumstances such as to justify Horton in inflicting immediate punishment on Charlie? Was there any danger of mutiny, or of insubordination of others of the crew, instigated by Charlie's disrespectful language to his superior, and was the ship or anything on board of her put in peril? True, the master was not on board at the moment. But he was close at hand—easily accessible—ready to hear complaints and redress grievances. And what was Charlie's offense? He had committed no overt act of disobedience. His offense was simply his insolent language. Again, if the circumstances were such as to warrant immediate punishment, was the punishment administered proper in kind and degree, and was it inflicted in a proper manner? If the officer

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inflicted punishment not justified by the circumstances of the case, or in an improper manner or degree, he did so at his peril; and if evil consequences resulted therefrom he is responsible.

Did Charlie lose his life through his own fault, or by reason of his being intoxicated? It is argued that when struck he was retreating down the steps, from the impending blow, and may have lost his foothold. If he was endeavoring to avoid the blow by retreating, then the injury was not the result of his own negligence. And if he was looking in another direction, and did not see the blow coming (as the testimony would seem to indicate,) then he had no opportunity to avoid it. But it is said he was drunk. [Referred to the testimony touching this part of the case.] Although he had been drinking, it appears he was able to go about his work as usual, and he went up and stood upon the gangway steps without support. But if you think it is proved that he was so much intoxicated that he had lost the control of his muscles and his foothold, to such an extent that it materially contributed to his death, you ought to weigh that circumstance in mitigation of damages.

3. If the plaintiff is entitled to recover damages, then the question is how much?

The measure of damages is not the injury done to Charlie in his person, but the injury sustained by the plaintiff by reason of the death of her husband. The damages in this case must be assessed on the principle of compensation or reparation to the plaintiff, and not that of punishment to the defendant. In an aggravated case, where the death had been caused intentionally, and accompanied by circumstances of cruelty or barbarity, the jury might perhaps be authorized to give vindictive damages as a punishment to the defendant and a warning to others. But this is not such a case; you will consider the plaintiff's loss of support, and her deprivation of the society, comfort and fellowship of her husband. Her loss must be estimated in a great measure by her husband's station in life, by his age, by his means of earning money, etc. But you are not to take into consideration the anguish of mind, be it great or small, which the plaintiff may have suffered from the loss of her husband. You will ascertain the damages, if any are awarded, in whatever way you may deem proper, keeping in

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view the basis which I have indicated. But I may be allowed to suggest that one way of compensating the plaintiff for her loss of support, would be to award her such a sum as would, if placed at interest, procure her an income sufficient to provide her with the necessaries of life.

The jury, after an absence of twenty hours, rendered a verdict for the plaintiff in \$1100.

SUPREME COURT—IN BANCO.

JOSEPH FALLON vs. HENRY ROBINSON AND J. S. WALKER, Assignees.

WHERE it is stipulated in a mortgage of personal property, that the mortgager shall remain in possession until breach of the condition, and if before such breach the mortgager is declared bankrupt, the mortgagee has a right to immediate possession of the mortgaged property, provided always that the mortgage is valid.

A *failure* under the Law of Bankruptcy of 1848 defined to be a refusal or inability to make payment of just demands for ten days after maturity, whereupon the party may be declared bankrupt.

Where a person had committed acts of bankruptcy more than ten days previous to being declared a bankrupt : Held, that any transfer of property then made (except upon a good consideration to a *bona fide* purchaser, having no notice of such insolvency or failure) is void by the statute, and the property must pass to the assignees for the benefit of all the creditors.

Justice ROBERTSON delivered the decision of the Court as follows :

Henry Turton, a hotel-keeper at Lahaina, was declared bankrupt, as of the 28th of April, 1859, the date of the filing of the petition in bankruptcy. Nine days previous, on the 19th of April, he mortgaged all his property, consisting chiefly of the furniture of his house, to Joseph Fallon, the plaintiff, to secure the payment of a promissory note for \$421 75, in favor of plain-

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tiff, and also to secure the plaintiff for becoming with Turton a party to a promissory note for \$200 50, made to B. F. Bolles, for a debt due to him from Turton.

The defendants are the assignees of Henry Turton, and have got in their possession the goods and chattels mortgaged to the plaintiff by Turton, as above stated; and the plaintiff has brought this action of replevin to compel the defendants to deliver said goods and chattels to him, under his mortgage.

Several points of considerable interest were raised by counsel, in the course of their argument, but it is only necessary, we think, to advert to some of them.

It is contended on the part of the defendants, that even admitting the mortgage to be valid, the plaintiff was not entitled, either at law or in equity, to the possession of the mortgaged chattels, on the 6th of October last, when he commenced this suit; because default had not then been made in the payment of plaintiff's debt, which was not due until the 19th of November, and the mortgage contains a stipulation permitting Turton to retain possession of and use the mortgaged chattels until such default shall be made.

The mortgage, if it is valid, and was duly recorded according to law, was a conveyance to the plaintiff of the title in the chattels mortgaged, upon condition, and would have become an absolute interest at law upon the failure of Turton to pay the debt secured by the mortgage when it fell due. The mortgage passed the property to Fallon, subject to the condition, without actual delivery, and he was entitled to the immediate possession, at any time, but for the stipulation by which he agreed that Turton should retain possession until default.

It cannot, of course, be contended that, under no circumstances whatever, could the mortgagee take possession of the property mortgaged, before default in the payment of the debt; for there are various events, upon the happening of which, the mortgagee might claim possession. In the case of *Hardy vs. Ruggles et als.*, decided in this Court in the year 1856, it was held that the mortgagee had a right to proceed at once for possession, because the mortgagers had attempted to transfer the whole of their stock in trade to other creditors, (the same being mortgaged to the plaintiff,) although the mortgage contained a

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stipulation permitting the mortgagers to retain possession until default, with the right to sell in the usual course of trade.

In the case of *Russell vs. Butterfield* (21 Wendell's Rep., p. 300), the mortgage contained a stipulation that the property should remain in the possession of the mortgager, but in case of default in payment, or in case of any attempt to remove or dispose of the property, on the part of the mortgager, the mortgagee to have a right to seize it, wherever it may be, and to sell and convert the same into money, and appropriate the proceeds to the payment of his debt, paying over the surplus, if any, to the mortgager. It was held, in that case, that upon the removal of the property into another county, by the mortgager, the mortgagee might maintain an action of replevin, although the time of payment of the mortgage moneys had not yet arrived.

In the case of *Welch vs. Whittemore* (25 Maine Rep., p. 86), the mortgage stipulated that the mortgager should retain possession of the property until default, with the condition (which is also contained in the mortgage now before us) that, if the property should be attached at any time before payment, by any other creditor of the mortgager, then it should be lawful for the mortgagee to take immediate possession of the property. It was held in that case that the mortgagee might maintain trespass against an officer for attaching and carrying away such mortgaged property, in a suit against the mortgager.

In the case of *Ballune vs. Wallace* (cited in U. S. Digest, vol. 7, p. 372, sec. 155) the Court held that "a stipulation in a mortgage of personal property, that the mortgager shall remain in possession until the breach of the condition is personal to the mortgager, and cannot be assigned or transferred. The mortgagee is not, therefore, precluded from bringing trover for the property, before breach of the condition, against a purchaser from the mortgager."

The doctrine of these cases seems to us reasonable, and is applicable, we think, to the case before us. Turton was declared bankrupt, and his property and affairs passed, pursuant to the statute, into the hands of assignees. But the only interest in the chattels mortgaged to Fallon, which passed to the assignees of Turton, was the right to redeem them by paying

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off Fallon's claim ; or to receive the balance of proceeds, if any remained, for the benefit of creditors, upon a sale of the chattels and payment of that claim. We think, therefore, that upon Turton being declared bankrupt, Fallon had a right to take immediate possession of the mortgaged property, if his mortgage was valid.

The most important question in the case, and one which must prove decisive, is that as to the validity of the mortgage, which is contested on the part of the defendants.

Section 1, of "An Act relating to Bankruptcy," passed in the year 1848, under which proceedings were had in this case, provides : "That every person owing debts to the amount of two thousand dollars, who shall refuse or fail to make payment of any of his just demands for ten days after they shall have matured, and been presented for payment to him or to his agent ; or who shall depart the Kingdom with the intent to defraud or delay his creditors ; or secrete himself, or keep his house to avoid his creditors, or the service of legal process for the collection of any debts ; or make any fraudulent conveyance of his property to a friend or secret trustee, or make any secret removal or other disposition of his property for the purpose of delaying or defrauding any creditor, may, upon petition to the Chief Justice of the Superior (Supreme) Court, by any one creditor to the amount of five hundred dollars, or by any two or more creditors, the sum of whose debts shall amount to one thousand dollars, be declared bankrupt."

Section 19, of the same Act, provides that "The bankrupt shall be divested of all title and interest in his property from the day of his failure (except the necessary clothing of himself and family and such other necessities, not to exceed the value of three hundred dollars, as the Commissioners may designate) and every assignment, conveyance or transfer of his property by him after he shall have become insolvent or committed an act of bankruptcy, except upon a good consideration to a *bona fide* purchaser, having no notice of such insolvency or bankruptcy, shall be void, and the property so transferred may be recovered and disposed of by the assignees for the creditors."

It is contended by counsel for the defendants that, under a fair construction of the statute, and on the facts of the case as

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they appear in evidence, the mortgage to the plaintiff must be declared void, as against the creditors, because Turton was known to the plaintiff to be insolvent at the time the mortgage was made, and had, in fact, committed acts of bankruptcy.

It is argued, on the part of the plaintiff, that there can be no *failure* by a debtor, within the meaning of the statute, until he has been declared a bankrupt, and that the words *bankrupt* and *insolvent*, as used in the nineteenth section of the Act, are synonymous terms. This, we think, is not the proper construction. And when the question is asked, what is a failure within the meaning of the statute? it may be answered so as to meet the present case, by quoting the opening sentence of the first section of the Act of 1848. Whenever any person, owing debts to the amount of two thousand dollars, shall refuse or fail to make payment of his just demands, for ten days after the same shall have matured and been presented for payment to him or to his agent, he has *failed* within the meaning of the law, so that he may, upon petition, be declared bankrupt. If his failure results from his not having the means to pay his debts, he is then *insolvent*, but not *bankrupt* until so declared by competent authority. A person may be insolvent for any length of time and yet not bankrupt, within the meaning of the statute; and so a person may be declared bankrupt who is not in fact insolvent.

It is contended that, as the mortgage was given nine days previous to the date as of which Turton was declared bankrupt, and that having been made upon a good consideration, for the purpose of carrying him through his embarrassment, it ought to be sustained. But it is clear, from the evidence before us, that Turton was insolvent when the mortgage was given, and that he had failed to pay several debts which were overdue and had been demanded, among which was his debt to the plaintiff himself. He had made the failure to pay his just debts, upon which he was shortly after declared bankrupt. And although he was declared bankrupt as of the 28th of April, he was in fact insolvent and had committed acts of bankruptcy more than ten days previous to that date. So that any transfer of his property then made, except upon a good consideration to a *bona fide* purchaser, having no notice of such insolvency, or failure,

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is void by the statute ; and the property must pass to the assignees, for the benefit of all the creditors. The result of making a mortgage of all his property to secure his debt to Fallon, could not be to obviate his embarrassment, but rather to bring it to a crisis, by alarming his other creditors. The plaintiff, as appears from the testimony, was well acquainted with the insolvency of Turton, and his failure to pay his debts. And yet he took from him an assignment of all his property, to secure the debts due to himself and B. F. Bolles, to the exclusion of the other creditors. This was clearly at variance with the policy of the bankruptcy laws, whose leading principle is equality among creditors. In order to attain and preserve that equality, the bankrupt's estate, as soon as an act of bankruptcy is committed, becomes a common fund for the payment of his debts, and he loses the character and power of a proprietor over it. He can no longer give preferences among his creditors, and the race of diligence between them is wholly interrupted. (Kent's Com., vol. 2, p. 470 ; Statute Laws, 1848, p. 54, sections 19 and 20.)

It is true, as has been argued, that the mortgage and other documents connected with the transaction between Turton and Fallon bear upon their face some of what are usually regarded as "badges of fraud ;" but they are all such as are open to explanation, and might be consistent with a *bona fide* transaction. In this case, however, the *scienter* which invalidates a conveyance made under such circumstances as the present, is so clearly brought home to the mortgagee that we are constrained, in justice to the other creditors, to declare the mortgage void.

Let judgment be entered in favor of the defendants, as of the last day of the term.

Mr. Bates for plaintiff.

Mr. Harris for defendants.

February 6, 1860.

Hanuu v. C. A. Williams *et als.*

SUPREME COURT—IN BANCO.

HANUU vs. C. A. WILLIAMS *et als.*

If one contract to labor for another for a specified term, and leave the service of the employer before the expiration of the term, without any cause attributable either to the employer or the act of Providence, he cannot recover his wages for the time he has actually labored.

But where damages were claimed for personal suffering in consequence of the non-fulfillment of the contract by the employer, upon a cause made, the Court awarded the value of the labor actually rendered to the defendants.

ALLEN, C. J.

This is an action of assumpsit on a contract for labor done and performed by the plaintiff for the defendants, and also upon a quantum meruit. There is also a special count for damages, viz: that the defendants did not furnish good, wholesome and sufficient food and water, and good and proper lodgings.

It appears that the plaintiff with others on the 18th of April last past, entered into a contract with the defendants to go to the Phoenix Islands, there to be employed in collecting and shipping guano, for a term not to exceed twelve months, or until the Phoenix Guano Company should wish his return home, provided that this should take place within twelve months, at \$10 per month; it was stipulated that he should have a free passage home after the expiration of the term of service.

It is in evidence that the plaintiff sailed from this port on the 19th of April last past for the Phoenix Islands, where he arrived after the usual passage, and he continued to labor for the term of six months, when he refused to continue his labor, and claimed that the defendants should give him a passage home at that time; whereupon there was a difficulty between the plaintiff and defendant's agent at the island, and soon thereafter the plaintiff was furnished with a passage home.

It is contended, on the part of the defendants, that as the contract was for a period optional with them not exceeding twelve months, and as the plaintiff by his own showing had not complied with the terms of the contract in this particular, he was not entitled to recover.

The counsel for the plaintiff contends that the contract is not

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mutual because the time for its expiration was not fixed at the same period for both parties. It may have required for the party in whose favor it was left to terminate the contract within the twelve months, to have given an additional consideration. We see no objection to the terms of the contract. The parties have a right to make a contract for a given period, and there seems to be no reason why it should not be terminated at the option of either party, or of one of the parties. It is not illegal or inequitable that it should be so. Such contracts for hire are reasonable and convenient in an enterprise of this character, for should it prove unsuccessful, there might be no occasion for the full term of service as stipulated. The Court regard the stipulation as founded in practical wisdom, and should receive the sanction of the law. In the case of *Down and Pinto* (24 vol. English Law and Equity Reports, 503), it appears that the plaintiff was engaged by the defendants to superintend their smelting works, by letter, in which they say, "we shall require you to enter into an engagement for at least three years, at our option, at a salary of £250." The Court held that this was a contract to stay three years, and giving the defendants the option of terminating the service at the end of each year.

The principle is here clearly recognized, that one party to a contract may have the option to terminate it when the other has not.

There is a distinction in the American and English doctrine—in this, that in the latter country the parties may make the contract with reference to a general usage, which thereby becomes part of the contract. So that a laboring man, if turned away without notice and without fault, is entitled to one month's wages, although there is no agreement to that effect; and in the case of *Down vs. Pinto*, referred to, the Court adjudged judgment due for the second year, as the plaintiff had entered upon that year's service. In the case of *Reab vs. Moore*, 19 Johnson, 387, where the party had agreed to work for eight months for thirteen dollars per month, the Court regarded it so far an entire contract, that if the plaintiff left without cause, before the eight months expired, he could not recover for any part of the time, although he had worked more than a month, as there was no provision that he should be paid monthly. In

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Davis vs. Maxwell, 12 Met., 286, the same principle is recognized as in Reab vs. Moore, although the defendant had paid a part during the continuance of the service. If one contract to labor for another for a specified term, and leave the service of the employer before the expiration of the term, without any cause, attributable either to the employer or the act of Providence, he cannot recover his wages for the time he actually has labored, this has been a doctrine most fully and elaborately discussed and approved by the Courts which we regard as of high authority. (Winn vs. Southgate, 17 Verm., 355; Davis vs. Maxwell, 12 Met., 286; Hunt vs. Otis, Man. Co., 4 Met., 465; Thayer vs. Wadsworth, 19 Pick., 349; Cuther vs. Powell, 6 T. R., 320; Ellis vs. Hunter, 3 Taunton, 52; Ridgeway vs. Hungerford Man. Co., 3 Ad. & E. 571; Turner vs. Robinson, Nal. 5 B. & Ad., 789.)

Upon our construction of the contract the whole term must be devoted to the labor as specified before a payment for wages can be legally demanded, unless exceptional payment be specified, or unless the contract is terminated by the acts of the employer. The defendant's promise to pay depends on a condition precedent to be performed by the plaintiff; when this is an *express agreement*, the claim must be settled upon its terms, and not on a *quantum meruit*; neither party has a right to abandon the terms of the agreement. Whoever fails to fulfill those terms without a justification by law will subject himself to liability. The weight of authorities for a long period in countries where their Courts have been accustomed to adjudicate on contracts of this character, sustains this principle of construction; *stare decisis* is a principle of great importance in preserving a consistency of judicial decision, and therefore we deem it wise to sustain this view, although in the case of Brittan vs. Turner (6 N. H., 481) the whole doctrine of these authorities is resisted with great ability, and *indebitatus assumpsit* on a *quantum meruit* is sustained. It is contended that the rights of the employer are sufficiently guarded, because all the damage he may have sustained from the breach of the contract may be deducted from the amount of the claim against him, or he may have an action to recover his damages for the non-performance of his contract. This principle has been most

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favorably regarded by some of the most eminent writers on the law of contracts. The same question, however, has arisen at a more recent period in other Courts, and been decided in conformity with the earlier decisions. In the case of *Bealy vs. Olmstead* (19 Pick., 528), which was an action of assumpsit for the balance of pay of five month's wages, where there was a special contract made by the plaintiff for six months' service, it was ruled that the entire performance was a condition precedent to the payment. Justice Morton says: "We have no hesitancy in adhering to our own decisions, supported as they are by principle and a long series of adjudications." (*Payer vs. Mansfield*, 2 Mass. R., 147; *Phelps vs. Sheldon*, 13 Pick., 50; *Stark vs. Parker*, 2 Pick., 267.) In a later case of *Price vs. Dwight Man. Co.* (2 Cush., 80) the same doctrine is distinctly held. The Court say that, "If the plaintiff agreed to labor for the defendants for one year, for instance, and left their service at the end of six months, without cause, she could not maintain an action for the services actually rendered, not exactly on the ground of forfeiture, but in consequence of the non-performance, on her part, of the special contract."

In *Jennings vs. Camp* (13 John., 94) the Court laid down this proposition, that a party who enters into a contract, and performs part of it, and then, without cause, and without the agreement, or fault of the other party, of his own volition abandons the performance, he cannot maintain an action on an implied assumpsit for the labor actually performed; of course he cannot sue on the express contract. This doctrine was recognized in the case of *Lantry vs. Parks* (8 Cowen, 63), and subsequently in *Sickles et als. vs. Pattison* (14 Wendell, 257.)

But, it is contended by counsel for the plaintiff, that if the contract is obligatory in its terms, that the defendants have not fulfilled it on their part, inasmuch as they have not furnished the plaintiff sufficient good and wholesome food and water.

There is much evidence on this part of the case, and it is conflicting. It seems to be conceded that the defendants, who are merchants of the highest respectability, furnished sufficient good and wholesome food and water, and, if there is any fault, it arose from the agents at the island in supplying the same to

the laborers. The law, as the Court have declared it, makes the rule stringent on the laboring man that he shall serve his entire term as per contract or forfeit the wages for the labor he has performed, besides incurring the liability for damages, if any harm arises, beyond the value of his services, and the Court will hold the rule equally stringent on the employers that they shall fulfill their part of the contract, a material part of which is, to furnish sufficient, good and wholesome food and water, and the question is, was the plaintiff supplied as he should have been? It will be borne in mind that he was employed on an island about three degrees north of the equator in shovelling guano into bags, in transporting them to the sea and in boating them to the vessel. The weather is hot and exhausting, and the labor is hard under the most favorable circumstances. It is in evidence that the work commenced at half-past five in the morning and continued until four P. M., and as some testified, till sundown. Now, what does a man require to sustain his health and strength, in labor of this character, in such a locality? He should be treated as to quantity and quality of food and water the same as if he was on this island, unless prevented by an accident against which a reasonable foresight could not guard, it became necessary to deal out at a restrictive allowance. But under no other circumstances can a restrictive allowance be justified. Labor in dust and dirt and under a hot sun is very exhausting, and the system must be supplied with food and water as nature demands. There can be no other rule for laboring men. In this case, it is very clear that there was, especially in the article of water, a restrictive allowance. They should have had all that was necessary for the preparation of their food, which to the Hawaiian is specially important, as well as for drink.

It is claimed further by the plaintiff that he should have damages for his sufferings on account of the non-fulfillment of the contract in this particular. The evidence does not sustain the allegation of that degree of hardship and privation, which has injuriously affected his health; if it were so, the Court would certainly award damages. But, in this case, the defendants had done their duty in furnishing ample supplies, and their agents at the island have not evinced a perverse disposition.

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The Court regard it as an error in judgment rather than in a purpose to stint the man in his food and water, either to save the supplies in derogation of the right of the plaintiff or for the benefit of the defendants. They may have been misled by their experience and practice on shipboard, but the rules at sea are not fully applicable to labor on the land. We therefore do not regard the case as one which is entitled to damages, although of sufficient merit to terminate the contract and to entitle the plaintiff to the value of his labor actually rendered to the defendants. The law can make no discrimination in the treatment of laboring men on the Phoenix Island or this island, so far as concerns the supply of wholesome food and water, except in case of loss of supplies at sea or by other casualty. It is therefore the decision of the Court that the plaintiff recover for six months' wages at \$10 per month, less \$21 85 paid him, making a balance of \$38 15, and costs of Court.

C. C. Harris and L. McCully for plaintiff.

A. B. Bates for defendants.

February 6, 1860.

SUPREME COURT—IN BANCO.

C. R. BISHOP *vs.* NAMAKALAA AND KAHINUKAWA.

In a case where error was alleged in the making of an award by the Board of Land Commissioners, the Court permitted evidence to be adduced, in order to ascertain whether such error existed or not upon the record of adjudication of the said Board, but not for the purpose of reviewing the decision of the Commission.

Present—Hon. E. H. ALLEN, G. M. ROBERTSON, JOHN LI.

This is an action of ejectment to recover possession of the northerly part of the house lot or premises situated on the easterly side of King street, in Honolulu, and particularly described in Royal Patent No. 299, issued to Abner Paki on the 14th day of May, 1851.

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The portion claimed is enclosed, and separated by a fence from the other portion or part of the said house lot as described in said Patent. The defendants plead the general issue. It was stipulated by the parties that the Supreme Court in Banco should try the cause.

It is admitted by the parties that the defendants were in occupation of the premises, and claimed the right of possession; and that they had had repeated notices by the plaintiff to quit during the last five years. It was also admitted that the Royal Patent No. 299, described as aforesaid, was issued to Paki, who had since deceased, and that the wife of the plaintiff was the only child and heir of Paki.

It was further stipulated that the defendants should have in Court all the rights and advantages which they could have, had they filed a bill in equity, for the conveyance to them of the said premises. The counsel for the defendants proposed to show that they held the property by right of prescription, alleging that they had been in undisputed possession more than thirty years. That in October, 1847, they had presented a claim to the Land Commission, and the same was heard in June, 1850, and that the award was issued to Paki Feb. 10, 1851, either fraudulently, or by error, as the testimony before the Land Commission did not sustain the award to Paki, but did sustain the claim to the defendants; and that, after Paki received the award, she had continued in possession, adversely, to the present time.

The counsel for the plaintiff contended that the award of the Land Commission was final, and objected to the introduction of testimony to invalidate it. The Court ruled that it was competent to introduce evidence to show that the award as recorded was not the same as agreed upon by the Commission, and that the Clerk had made an error in recording the judgment of the Commission. It appeared by the evidence before the Land Commission that the defendant, Kahinukawa, and Paki were claimants of the land in question, and that evidence was introduced to support the claims of each, and that the Board awarded the lot to Paki, and that a certificate of award was issued to him on the 10th Feb., 1851, signed by all the members of the Board; Mr. Justice Ii testifies that he signed it supposing it to

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be in favor of Kahinukawa, one of the defendants ; after discovering the error, he applied to the members of the Board to correct the alleged error, but they did not reconsider it ; he then informed Kahinukawa that the award had been made to Paki, and advised her to appeal, which, however, she did not do.

The inference is that there was no mistake in the record, for Mr. Ii's testimony is that he brought the subject to the consideration of three of the Commissioners, and represented to them the error in making the award, which, it seems, by their omission to reconsider or alter the award, that they regarded it as rightfully and legally made. His testimony fully rebuts the presumption of error in the record, and clearly confirms the award as the judgment of the Board. Had it been a palpable error, as assumed, they would at once have corrected it ; as they did not, it was doubtless their deliberate judgment that it should stand. The record of the Land Commission was admitted for the purpose of corroborating the evidence of error in the record, or error in the transcript.

For instance, if an award was issued to one who was not a claimant before the Land Commission, and for whose rights no evidence was introduced, it would be strong evidence of error : and for the purpose of sustaining the allegation of error in the record, the Court permitted evidence to be adduced, and not for the purpose of reviewing the decision of the Commission. The Court regard that as final, and they fully sustain the position taken in the case of *Kukiiahu vs. William Gill*, Haw. Rep., vol. 1, p. 54, in which Chief Justice Lee says :

“The Land Commission may have decided wrong, but if so. Gill or Kalua, both of whom had notice of the award, could have appealed to the Supreme Court, agreeably to the statute in such case made and provided. In that Court they could have shown fraud, want of title, or anything else affecting the case ; but it cannot be done here, under the circumstances. If we are to go into these cases anew, treating the awards of the Land Commission and the Supreme Court as nothing, then there is no security for any man's real estate—no rest for his title—and the whole Kingdom will be afloat.”

In this case, if the party has suffered by a mistaken decision

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of the Commission, they neglected to take the opinion of the Supreme Court which they could have had on their appeal. By this omission they lost the right of a re-hearing. The rights of all parties are far better subserved by adhering rigidly to the rules of law. If they are relaxed, there is no end to litigation and its burdens. With this view of the award of the Land Commission, the Court cannot entertain evidence in support of rights arising from prescription, or adverse possession prior to the date of the award. It will not be contended that rights of that character have arisen since that period.

Even by the evidence of the defendants themselves, they have had every opportunity to present their case, both before the Commission and by appeal before the Courts. Failing to do this, and also failing to show an error, or fraud in the record, the Court are clearly of opinion that plaintiff is entitled to judgment, with costs.

Let judgment be entered for possession of the premises as described in the petition of plaintiff, with costs.

March 26, 1860.

SUPREME COURT—AT CHAMBERS.

IN THE MATTER OF J. T. WATERHOUSE—PETITION FOR A WRIT
OF MANDAMUS.

WRIT of mandamus is a matter of discretion with the Court, to be exercised upon legal and equitable considerations.

Proper remedy when an inferior tribunal refuses to act upon a subject properly brought before it.

The Court will never direct an inferior tribunal how to decide, but will require it to proceed to judgment.

Will not lie to control or coerce the *discretion* of a subordinate tribunal.

Not the proper remedy to correct irregularities in the proceedings; they ought to be excepted to and made the basis of an application for a writ of error, or brought up on appeal in the ordinary way.

When goods have been distrained by the Tax Collector, under Section 503 of

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the Civil Code, and an order for their sale applied for, from the Magistrate, the proceedings on such an application are unlike a suit at law between parties, and not subject to the rules affecting such suits, and the Justices may adopt and pursue such a mode as may seem fair and reasonable in the discharge of their duty; full latitude allowed in the introduction of testimony, that the Magistrate may be informed as to the propriety of the Tax Collector's acts, with a view to authorizing him to sell the goods distrained.

Duty of the Magistrate to issue the order of sale, when the official requiring the order is proved to be the legally appointed Tax Collector, that the property seized is at least *prima facie* the property of the person by whom the tax is due, and that it is a reasonable quantity, and that a legal notice of the sale is given.

The application for an order to sell is directed to the sound legal discretion of the Magistrate, and it is his duty to exercise it.

No Police or District Justice authorized to cite and apply the provisions of the fourteenth section of the Civil Code in any case whatever.

ALLEN, C. J.

The petitioner sets forth that he was cited to appear before Robert G. Davis, Esq., Police Justice for the city of Honolulu, on the 7th instant, at the instance of William Webster, alleged to be a Tax Collector for one of the districts of Oahu, and that the case was postponed till the 13th, when said Webster introduced evidence against the petitioner, and closed his case, whereupon the said petitioner, being of the opinion that he had no occasion to offer any evidence to the Court, moved that the complaint or petition of said Webster be dismissed; that the said Magistrate thereupon deferred judgment on your petitioner's said motion till the 13th, on which day he proceeded to give a lengthy judgment on the said motion of your petitioner, in which said judgment the said Magistrate averred or stated that the said Webster had not offered evidence, such as would enable the said magistrate to grant the prayer of the petition of the said Webster, and yet he refused to grant the motion to dismiss, and ordered that the said Webster should bring before him other evidence to support his petition, and that the order was made without motion; against which proceeding petitioner excepted and desired that the magistrate would certify the proceedings to the Supreme Court, which he refused to do, and after the usual averments of tender of costs and bond, "prays that the said Robert G. Davis may be com-

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manded to certify to your Honorable Court the proceedings in the case of William Webster against John T. Waterhouse, together with his (the said Magistrate's) decision in the premises—that is to say, on the motion of the defendant, your petitioner—and your petitioner further prays that, when the said proceedings may have been certified, the said decision of the said Magistrate, Robert G. Davis, Police Justice of Honolulu, as aforesaid, to wit: "That the said William Webster may be allowed or ordered, or required to produce further testimony in the case, may be reversed," and that the said Police Justice may be commanded to give judgment in the premises on the evidence which has been adduced before him, at the instance of the said plaintiff.

Whereupon an order was issued to the Police Justice to appear before the Chief Justice and show cause why a writ of mandamus should not issue directing said Justice to give judgment in the case of Webster *vs.* Waterhouse, on the evidence already adduced, and that he should bring with him the records of the proceedings had in said suit.

The Police Justice appeared before the Court and made substantially the answer following:

First. That there is not now, nor has there ever been, a *suit* pending before him as Police Magistrate, in which William Webster, as an alleged Tax Collector for one of the districts of Oahu, is plaintiff and John T. Waterhouse is defendant, in which he could render a judgment, and that therefore a mandamus to compel him to give a judgment would require of the respondent to do an absurdity.

Second. That he brings into Court the record of proceedings as prayed for, and says that he does not regard himself as acting in a judicial capacity in the application for said order to sell, and therefore is not bound by the ordinary rules of law in admitting or rejecting evidence, or of those regulating the mode of judicial proceedings.

Third. That a citation was issued by him to said Waterhouse, at the suggestion of the District Attorney of Oahu, to come in and show cause why an order should not be issued to the Collector of Taxes to sell his property which had been seized, that said Waterhouse might be advised that an applica-

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tion had been made for such order, that he might appear if he deemed it right, etc., for his interest to show cause why such an order should not be granted, if within his power, or that he might take legal measures, if he desired to test the legality of the statutes of this Kingdom for the assessment and collection of taxes, or of the proceedings of the Department, or officers whose duty it is to carry those laws into effect; but that such citation, or summons, was not required to be issued by law, and was therefore only an act of courtesy, and had this respondent granted the order *ex parte* without issuing such citation or summons, it would not have been in the power of any Court of this Kingdom to set the same aside, and had property been sold on such an order, the order of sale would have been held good, and had John T. Waterhouse been injured thereby he could have his remedy in the courts of the country, like any other resident or subject who has been trespassed upon by his neighbor.

Therefore the respondent prays that the petition for a mandamus to compel him to certify to this Honorable Court the proceedings against John T. Waterhouse on trial before him as alleged, on the 13th of February, A. D. 1860, and that when the said proceedings have been certified, that the decision of the respondent that William Webster, as Collector of Taxes, may be allowed to produce further testimony in that case may be reversed, and that this respondent may be commanded to give judgment in the premises on the evidence before him, may be dismissed with costs, and that the respondent may be allowed to discharge his duty, as he is ready and willing to do, according to law.

The writ of mandamus is a matter of discretion with the Court, to be exercised upon legal and equitable considerations. It is certainly a proper remedy when an inferior tribunal refuses to act upon a subject when brought properly before it;—a Supreme Court will never direct an inferior tribunal how to decide, but will require it to proceed to judgment; a mandamus will not lie to control or coerce the discretion of a subordinate tribunal. (1 Wendell, 299; 7 Cowen, 363, 523; 11 Pick., 189.) It is said by the respondent that he is ready and willing to proceed to the further investigation of this case, and will then give judgment, but that he has a discretion to exercise in the mode

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of proceeding. It is a general rule of practice in common law courts that, when both parties have closed and rested, and arguments submitted, it is the duty of the Judge then to decide on the case as presented, and this rule should be regarded. As the record stands, the petitioner made a motion to dismiss, and that motion remains undecided; instead of doing which, the Court entered into a legal argument on the general question, and suggests to the applicant for the order to sell to introduce further evidence. This is a course not recognized by legal tribunals. This motion, if properly entertained by the Police Court, should have been decided; still it is an interlocutory motion, and a mandamus is not a proper remedy to regulate the proceedings as they are progressing. It can only apply when the Court refuses to decide.

Where a Court of inferior jurisdiction has no power to grant a new trial, after a verdict on the merits, a mandamus will be awarded to compel them to enter judgment. (1 Johnson's Cases, 179; 7 Peters, 635.) A District Judge in the United States Court was ordered to reinstate a cause, make up the record, try the cause and enter judgment, in order to give the demandant the benefit of a writ of error. In this case, if the Police Justice should pursue the course indicated by him in his written opinion, it could not deprive the petitioner of his right to have the case presented to the Supreme Court. And in the consideration of the question now before the Court, they do not regard it legitimate for them to examine into the regularity of the proceedings in the Police Court, as they would do on a writ of error. In the case *exparte Myra Clarke Whitney* (13 Peter's, 404), Judge Story said, that the prayer of the petitioner was for a mandamus in the nature of a writ of procedendo to compel the Circuit Court of the United States to proceed according to chancery practice, in her suit against Richard Reef and others to answer her bill, and to suffer the petitioner in all things to proceed in the cause in such manner as the Constitution and laws of the United States and the principles and usages in equity would authorize.

That it was the duty of the Circuit Court to proceed in that suit according to the rules prescribed by the Supreme Court for proceedings in Equity causes at the February Term thereof,

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A. D. 1822, could admit of no doubt. That the proceedings of the District Judge, and the orders made by him in the cause, which were complained of, were not in conformity with those rules and with chancery practice could admit of as little doubt. But the question was not as to the regularity and propriety of those proceedings ; but whether the cause before him was one in which a mandamus ought to issue. And he was of opinion that it was not such a case. The District Judge was proceeding in the cause, however irregular that proceeding might be deemed; and the appropriate redress, if any, was to be obtained by an appeal after the final decree should be had in the cause. (See 15 Peter's, 9 ; 14 Peter's, 599, 614.)

It is the duty of this Court to review the proceedings of the subordinate tribunals on all proper applications when they exceed their jurisdiction, or assume a power not warranted by law, and if the Police Magistrate, as is alleged by the counsel for the petitioner, assumed powers vested in a Court of Equity, he misapprehended his duty and his powers, and it was a clear misapplication of the meaning and intent of Sec. 14 of the Civil Code. It is due to him to say, however, that he alleges that he intended to claim no such equity power, but merely to exercise a sound discretion in his interpretation of the provisions of the law on which the application for the order of sale was made.

It is contended in this case that the duty of the Police Judge is ministerial, and that instead of not proceeding, that he has proceeded too far in seeking for a basis on which to rest his judgment on the application for an order of sale. While by the learned counsel for the respondent in that application it is contended, that if his acts should have been ministerial under the provisions of the tax law, still having conducted the matter judicially, he cannot now be released from his course of proceeding. This question having been raised, and ably argued, although not necessary for the decision of the motion for a mandamus, still the Court regard it their duty to give a construction to the statute upon which the original proceedings were predicated, and which gave occasion for this application. The Section referred to is as follows :

"SECTION 503. The said collector shall call on each tax

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payer at his residence, or usual place of business, or otherwise give notice to the tax payers to meet him at convenient points or settlements of the district, in the months of September, October and November, to demand payment of the taxes assessed as aforesaid; and if any person shall neglect or refuse to pay his taxes, when so called upon or notified, until the last day of November, the tax collector may levy the same by distress upon so much of the goods and chattels of such person, as he may deem sufficient for the payment of taxes and expenses of collection, and sell the same upon the order of the District Judge or Police Magistrate, after a public notice of five days. In case no property can be found whereon to levy, then such person, if able bodied, may, by sentence of said Judge or Magistrate, be compelled to discharge the amount of his tax by labor on the public roads, or other public works, at the rate of twenty-five cents per day."

That portion of the section which authorizes the collector to distrain the goods and chattels for non-payment of taxes is very clear, and in accordance with the usual provision of laws for the collection of taxes in other countries. The theory of the law is that the Government must be sustained, and to do this it must be saved from bankruptcy, and therefore this summary proceeding has always been regarded as a necessity. Those statutes are designed to prevent delay in the collection, giving however all legal rights afterwards to test the validity of the law imposing the tax, and the mode of assessment—in fine, all other questions bearing upon it. This theory pervades all laws for the raising of revenue for the support of governments. Duties are paid at the Custom House under protest, and the remedy is sought afterwards in the Courts of the country. Still the money is paid in all cases, no matter whether it arises from internal taxes or from duties upon importations. In the United States, special statutes have been passed to hasten the proceedings in suits on bonds for duties, and which do not apply to suits at law generally. It is there made the duty of the Court, when a suit has been instituted on any bond for the recovery of duties, to grant a judgment at the return term upon motion, unless the defendant shall in open Court make oath that an error hath been committed in the liquidation of the

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duties demanded upon said bond, specifying the error. If the Court are satisfied that a continuance is necessary, for the attainment of justice, and not otherwise, a continuance may be granted to the next succeeding term and no longer. So that the measures of legislation for the collection of internal taxes are always summary, and whenever bonds are taken for the collection of duties on importation, which I believe few countries now permit, a more summary course is imposed on the Courts than in ordinary suits. This however is not intended to infringe upon or sacrifice the rights of the tax payer; whatever defense he may have against the claims of the Government can be fully presented, and if founded in law and justice will most certainly prevail.

Had the statute of this Kingdom conformed to that of most other countries for the collection of internal taxes, no question would probably have arisen on its construction, but an additional provision is made to the effect that after the collector has distrained the goods and chattels, it is made his duty to make application to the District Judge or Police Magistrate for an order of sale, of which a public notice of five days shall be given. In the application for the order of sale, is the duty of the District Judge or Police Magistrate merely ministerial? It is true that a judicial officer may by statute be empowered to perform a merely ministerial duty, and a mandamus is the proper mode by which to enforce that duty—such for example as signing a judgment, or granting a bill of exceptions. But in this case, if the duty is merely ministerial, of what use is it? If the magistrate has no more power than this, why the additional provision? It is to be regretted that the Legislature does not state fully the intent of the law, and the duty of the officers who are to enforce it. If the tax payer was to have by this statute an additional guard over his rights, to what extent does this section give it? The learned counsel for the petitioner contends that the duty is judicial to the fullest extent, and that it is the duty of the Court as fully to consider the case in all its legal bearings, viz: the validity of the law imposing the tax, the mode and manner of assessment, and the acts of the collector, as if he had instituted an action of trespass against the collector for seizure of the goods. The law contemplates

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an annual tax, and it is made the duty of the tax collector to pay to the governor of the island in which his district is situated, the amount of taxes by him collected, except the school tax, on or before the last day of December in each year. If the seizure and order of sale are only preliminary proceedings, subject to the delay incident to courts of law, the purpose of the Government is not obtained; its treasury may be bankrupt and its power overthrown. If the law was passed with reference to the analogies I have adverted to, is it not reasonable to suppose that the intention of the Legislature was to give additional means, promptly within the time specified? Would it not be an extraordinary stretch of judicial power and contrary to the uniform practice of courts, that the whole judicial investigation should be had as a preliminary to the collection of the taxes?

I am of the opinion that the Legislature could not have entertained such an extraordinary intent, as preliminary to the collection of the taxes which they had imposed, to subject the law to the adjudication of the District Judges or Police Magistrates—a law which frequently involves the highest and most important principles within the range of judicial learning. It must be borne in mind that while Government is bound to give protection to the subject, and to all residents within its borders, the duty is reciprocal, by furnishing the means to that Government to afford that protection. This is no new principle. It lies at the basis of all Governments.

If, then, the duty of the Magistrate is not ministerial, judicial to the extent to which I have adverted, the question arises what is his duty by virtue of the statute? I regard it his duty to issue the order of sale, if the official proves that he is the legally appointed Collector, and that the property seized is at least *prima facie* the property of the person by whom the tax is due, and that it is a reasonable quantity, and that a legal notice of the sale may be given; so that a sacrifice may be avoided and there may be some other requisites in some cases to guard the owner of the property against injury. This provision may be very salutary in this country, where experience in executing laws is less than in the old countries. It was given by the Legislature as an especial shield of protection against inexperience or injudicious collectors, but not as an instrument to

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defeat this source of revenue, till, perhaps, one of the highest duties of the Government should be sacrificed, which is the payment of its debts and the preservation of its credit.

This is the view which the Court entertains of the statute upon which the question has arisen. I should not have given this opinion upon the statute on a motion for a mandamus had it not been presented and argued by the learned counsel in the case. As it has been, I felt it my duty to do so.

There is another reason why the Court would feel obliged to refuse the mandamus, even if the views so ably presented by the petitioner, that he was now entitled to a full judicial investigation, were tenable. I regard the application for the sale of goods and chattels seized by the Collector as unlike a suit at law. Pleadings are not required—no formalities are requisite. In a suit at law it is the duty of the Court to decide the case as presented. The application for an order to sell is directed to the sound legal discretion of the Magistrate, and it is his duty to exercise it. The statute makes it his duty to investigate the matter, and although the Collector, or the person taxed, might not conform to the rigid rules of presenting a case in a common law Court, still I should regard the Magistrate derelict in his duty if he failed to pursue the investigation till he became satisfied whether it was his duty to grant the order or not.

In a suit at law the duty is upon the parties to present their case. In an application for an order to sell under this statute referred to, it is the duty of the Magistrate to satisfy himself; and that duty cannot be defeated either by the stupidity, the negligence or the adroitness of one party or the other, in their application to the proceedings of the rigid rules which obtain in common law Courts.

The Legislature could not have anticipated that the Collector would become a party to a lawsuit on every application for an order to sell the goods and chattels which he may have seized for the non-payment of taxes. The provision is unusual, and the proceedings under it are still more so, but a little practice may make it feasible and useful, and prevent the Collectors from a hasty or imprudent administration of their office.

In view of the principles which govern the issue of a writ

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of mandamus, I am of opinion that this is not a case that will warrant it. It would be a new application of the writ. The effect of this mode of interposition would be to retard the proceedings in the inferior Courts, so that the same cause might come before this Court in various forms before a final judgment.

The petition is therefore dismissed with costs.

An appeal having been taken to the full Court, Justice ROBERTSON delivered its decision as follows :

On the 28th ultimo the Chief Justice rendered his decision, at Chambers, refusing to grant the application of the petitioner, for a writ of mandamus to compel the Police Justice of Honolulu to give a final judgment on an application of William Webster, Tax Collector of Honolulu, for an order to sell certain personal property of the petitioner, distrained for non-payment of taxes, which application is now pending before said Police Justice. The application for a mandamus now comes before the full Court, on appeal from the decision of the Chief Justice.

The facts of the case are so fully set forth in the written opinion and decision of the Chief Justice, that we deem it unnecessary for us to re-state them, in giving our opinion on the matter.

The relator, in his petition, does not confine himself to asking the Court to grant a mandamus to compel the Police Justice to proceed at once to final judgment, but he asks that the Justice may be required to certify up the record of his proceedings to this Court. It does not appear to us that this was necessary in the application for the mandamus ; but as the Chief Justice, at the relator's request, while granting an order to the Police Justice to appear and show cause against the application, required him also to bring up the record of his proceedings ; and as the Police Justice has done so and made that record a part of his answer, we regard the same as a part of the case now before us, and its correctness admitted. True, the petition goes on to ask that, when the

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record shall have come up, the ruling of the Police Justice, permitting the Tax Collector to present additional testimony in support of his application, should be reversed by this Court. But it strikes us that it would be a novel proceeding for this Court to send a writ of mandamus to an inferior Court, commanding it to send up its proceedings, in a matter still pending and open before it, for the purpose of our revising and reversing a ruling made by such Court, as to the admission of, or refusal to admit, additional testimony, even if such ruling were erroneous on its very face.

Leaving aside that part of the petition to which we have just referred, and treating it as simply an application for a mandamus to compel the Police Justice to give a final judgment in the matter, on the evidence already adduced before him, the first question for us to decide would seem to be, is this a case in which a mandamus will lie?

In our opinion, this cannot be regarded as a suit between two parties, in the Police Court, in which William Webster is plaintiff, and John T. Waterhouse defendant, and in which a judgment would have to be entered in favor of one of the parties. We regard it as a special proceeding, had before the Police Justice, in the discharge of a special duty which is cast upon him, in common with other Police and District Justices of the Kingdom, by Section 503 of the Civil Code, and not a part of his ordinary duty as a Court of law. Nor is it a suit brought by the Tax Collector against John T. Waterhouse, to obtain a judgment and execution against him for the amount of his unpaid taxes. The law expressly relieves the Collector from the necessity of instituting such a suit, by authorizing him to distrain property for the payment of taxes, according to the assessment roll, without the authority of any Court.

Admitting, for the sake of argument, that this should be regarded as a civil suit between two parties, even then, it seems to us, the writ of mandamus ought not to be granted, as the case stands at present. Upon reference to the record of the Police Court, it appears that when the proceedings there were stayed, by this application for a mandamus, there were pending and undecided, a motion made by the relator's counsel, to dismiss the application of the Tax Collector, upon the evidence

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as it then stood ; and a request that if his motion to dismiss should be denied, the relator should have the privilege of introducing further testimony on his side of the case. If the motion to dismiss was properly entertained by the Police Justice, (which we think it was not, if this is a suit between parties,) and that motion remains undecided, then the case is still open ; and if that motion shall be denied, the relator may have the privilege which he claimed, of introducing testimony in opposition to the application for the order of sale. His counsel argues before us that he is entitled to the mandamus, to compel the Police Justice to decide upon his motion to dismiss the Tax Collector's application ; but this is not what he asks for in the petition now before us, in which he states that his motion has already been decided in the negative ; and even if in his petition he did ask for this, he would not be entitled to it if this is a suit between two parties, for, in that case, the motion to dismiss is an improper motion—one which the Police Justice ought not to have entertained in a suit, and which this Court cannot, by mandamus, compel him to entertain or decide. Were we to do so, we would simply be adding one more to several irregularities which already characterize the proceedings in this matter. Again, if this is a suit between two parties, no matter how many erroneous rulings, or irregularities, in regard to points of practice in the conduct of the case, may take place in the Police Court, this Court cannot interfere pending the proceedings by a writ of mandamus, to correct those errors or irregularities. They ought to be excepted to, and brought up on appeal in the ordinary way, or made the basis of an application for a writ of error, at the proper time.

In our view of the case, however, the relator's counsel, in treating this proceeding as a suit between party and party, and asking this Court so to regard it, has made a mistake. But, while we think this is clear, it appears to us equally clear that the argument of respondent's counsel, who contends that this Court has no right, under any circumstances, to control the Police Justice, in relation to the discharge of his duty in the premises, it being merely a ministerial duty, is altogether unsound ; for we think there can be no doubt that, if any Police or District Justice should refuse to entertain the application of

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the Tax Collector, for an order to sell distrained goods, this Court might compel him, by mandamus, to hear and determine such application, in order that the goods might either be sold or released from distraint, without unnecessary delay. It seems to us that a mandamus would lie, to compel a Police or District Justice to discharge his duty in regard to the matter here involved, with the same propriety that it would to compel him to sign a certificate as an inspector of elections, under Sections 791 and 792 of the Civil Code, which subject affords another instance, in which the laws have imposed extra-judicial duties upon District Justices.

Treating the matter, then, not as a suit at law between the parties, but as a special proceeding before the Police Justice, under Section 503 of the Civil Code, has the Police Justice assumed an attitude which entitles the relator to a writ of mandamus, ordering said justice to do anything in the premises? In our opinion he has not. The Police Justice has neither refused to hear testimony and proceed with the matter before him, nor give a decision, when he shall have finished such inquiries as he deems necessary to guide him in the discharge of his duty.

As an application by a Tax Collector to a Police or District Justice, for an order of sale, is not the institution of a suit at law between parties, it is obvious that those Justices, in hearing and deciding upon such an application, are not bound to proceed according to the strict rules of pleading and practice applicable to such suits; (indeed the District Justices are not strictly confined to forms in any case,) nor ought the parties interested, for or against such application, to be held to a rigid conformity with those rules. Such a mode of dealing with the subject would, in many cases, frustrate the evident design of the Legislature in requiring a Tax Collector to obtain the sanction of the magistrate before selling property distrained for taxes; a provision which seems to be intended for the prevention of extortion, oppression, and litigation, as well as to afford an opportunity to any third party, claiming an interest in the property distrained, to protect his rights without resorting to a formal and expensive action at law.

We would not be understood, however, as approving the

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application by the Police Justice, of the provisions of the fourteenth section of the Civil Code to this proceeding ; or as intimating an opinion that a Police or District Justice is authorized to cite and apply those provisions, in any case whatever. But, from the special nature of the duty imposed upon the Justices in regard to this subject ; from the consideration that the proceeding on application is not like a suit at law between the parties, nor subject to the rules affecting such suits ; and from the fact that the statute does not point out any particular mode of proceeding to be observed in these cases, we are of opinion that the Justices may adopt and pursue such a mode of discharging their duty in the premises as may seem fair and reasonable, and best adapted to the purpose. No injustice can result from their adopting such a practice as will permit, to all parties interested, full latitude in the introduction of testimony necessary for the information of the Magistrate, as to the propriety of the Tax Collector's acts, and of authorizing him to sell the goods distrained. Such a mode of procedure will tend to insure justice, and prevent injuries to private rights.

In our opinion the decision of the Chief Justice, at Chambers, must be affirmed, and the mandamus refused.

C. C. Harris attorney for petitioner.

A. B. Bates for the respondent.

March 5th, 1860.

SUPREME COURT—IN ADMIRALTY.

FRIEDREICH BURRMEISTER vs. HEINRICH SEYER.

THE master of a ship, who permits his mate to inflict an unjustifiable and excessive beating upon a seaman in his presence, is responsible to said seaman in damages for the assault.

Before Justice ROBERTSON, at Chambers.

This is a libel, in a cause of damage, filed by Friedreich Burrmeister, lately employed as a seaman on board of the whaleship

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"Republik," now lying in the port of Honolulu, against Heinrich Seyer, master of said ship, in which the libellant claims to recover damages for an unlawful assault and battery alleged to have been committed upon him, on board said ship, on the 27th of February last, by the chief mate, in the presence, at the instigation, and with the approval of the said master, the present respondent; by which battery the libellant alleges that he was ruptured, and permanently injured.

It appears by the testimony in the cause, that on the 27th of February the "Republik" left the harbor of Honolulu to proceed on a cruise; that shortly after the pilot left the vessel outside of the port, the master or the mate accused a seaman named Weddley, who was on the starboard side of the quarter-deck, of having gone to the Bremen Consul in Honolulu to make complaints; and upon Weddley having denied the charge, the master struck him several times about the face and upper part of the body; that when struck Weddley said Burrmeister, who was on the larboard side, had been to the Consul, whereupon the chief mate assaulted Burrmeister, striking him repeatedly with his fists, knocking him down, or causing him to fall on the deck, and then kicked him, or stamped on him twice, when the master interfered, telling the mate not to kick the libellant, but that he might or should chastise him in some other way; that the mate then ceased to strike Burrmeister, who got up and went forward into the forecastle; that in a few minutes afterwards the master and the mate went together and called Burrmeister up on deck, to assist in cat-heading the anchor; and that Burrmeister immediately obeyed and went to work as ordered, when the master told him he should not go below without leave, and struck one or two blows, adding some threatening language, addressed to all the crew, expressive of his intention to discipline them.

Several of the allegations in the libel are not proven. For instance, the libellant alleges that by the blows and kicks inflicted upon him he was ruptured in the abdomen and permanently injured. But it appears by the testimony relative to this point, that the libellant was ruptured before the time of this assault, and was in the habit of wearing a truss during the last cruise of the ship. So that while it is probably true, as

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testified by a witness who saw the libellant's rupture both before and after the beating in question, that the rupture was somewhat enlarged in consequence of the kicks and fall which he sustained; the allegation that the rupture was originally caused thereby, is clearly disproved. It is due, however, to the proctor who prepared the libel to say, that he stated in the course of his argument, what is quite probable, that the error had arisen from the difficulty he found in communicating with his client, who speaks only the Dutch language.

It is also alleged in the libel, that at the time the assault was committed on Burrmeister, the master and the mate were in a state of gross intoxication. But, it gives me pleasure to say, I regard this allegation as conclusively disproved by the evidence; and I consider both the master and the mate entirely and satisfactorily cleared from an imputation so derogatory to their good name and character as officers.

It is, however, clearly in proof, that an assault and battery was committed on the libellant by the mate, in the presence, at the instigation, and with the approval of the master, shortly after the steam-tug had left the ship outside of the port. The only reason assigned at the time for the beating of Burrmeister was, that when in port, he had gone to the Consul of Bremen to make some complaints of bad treatment; and no other excuse or justification appeared before me at the hearing. It seems hardly necessary for me to say that the reason assigned affords no justification whatever for beating the libellant. To hold that it is a justification would, it seems to me, be an outrage against right and common sense; and the promulgation of such a doctrine, by this Court, would probably result in the inauguration of the reign of tyranny and terror, on board of a large portion of the whaling fleet frequenting this ocean. What the fruits would be of such a system, may be inferred from the fact that the immediate result of the beating of Weddley and Burrmeister for the reason assigned, followed by the threatening language of the master, was a mutiny by the men of the watch to which they belonged, near midnight, and so much disorder on board, that the master was obliged to put back with his ship to Honolulu.

It is certainly better, so far as the interests of navigation are

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concerned, that seamen should have free scope, while in port, to make their complaints, whether well or ill founded, to the Consul placed here by the country under whose flag they sail, for the purpose, *inter alia*, of hearing those complaints, than that they should be led to feel that they can have no redress for their grievances, save that which they may be able to obtain by resorting to violence.

In the case now before me, the respondent is plainly chargeable with a flagrant abuse of his authority. So far from protecting the libellant from the violence of the mate, which it was his duty to have done, he first set the example himself by beating Weddley, and then instigated and approved the conduct of his chief officer in beating Burrmeister, until the latter had received several kicks on his prostrate body, when he interfered and objected to that mode of chastisement. Again, the respondent was wrong in striking Burrmeister while at work on the forward part of the ship. From the circumstances there can be no doubt that the libellant had occasion to go below at the moment, and he returned to the deck immediately on being called, and went about his work. Not a particle of evidence appears to show insolence or disobedience on the part of the libellant, and the master was therefore unjustifiable in striking him. Had the beating inflicted upon Burrmeister by the officers been merited by reason of his insubordination, or other misconduct, it could not perhaps be designated as cruel or unusual, but as the case stands, it was harsh and inexcusable.

In view of all the circumstances of the case, I shall award the libellant the sum of one hundred and fifty dollars damages, and the costs of suit.

Let judgment be entered accordingly.

Mr. Harris, proctor for libellant.

Mr. Bates, proctor for respondent.

March 12, 1860.

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SUPREME COURT—APRIL TERM—1860.

J. T. WATERHOUSE vs. WILLIAM WEBSTER, TAX COLLECTOR OF
HONOLULU.

DUTIES of Tax Collectors and tax payers defined.

The Collector not responsible for the nonfeasance or malfeasance of the Assessor, or that of any other officer.

The tax list, in the hands of the Tax Collector, is in the nature of an execution, running against the person and property of the party, and, if good upon its face, protects the Collector acting under it.

Goods distrained by the Tax Collector can not be replevied by the delinquent tax payer, such goods having been found in and taken from *his* possession.

This action, in another form, was commenced in the Police Court, in February last, by a requisition upon Waterhouse to show cause why the Tax Collector should not sell certain of his goods, distrained for taxes. The District Attorney having then established such a case as he thought necessary, rested; on which the counsel for Waterhouse, Mr. Harris, moved for judgment.

Justice Davis, in an elaborate decision a few days after, ruled that this was a matter differing from an ordinary suit at law, and resting in the sound discretion of the Magistrate, and ordered the Crown Solicitor to produce evidence touching the appointment of Assessors, etc. Mr. Harris then took out an order from the Chief Justice, requiring Judge Davis to show cause why he should not proceed to judgment upon the case already made by the plaintiff in that suit. Upon hearing and argument the mandamus was denied, and appeal taken to the full Court, where the decision of the Chief Justice was confirmed. The hearing was then resumed in the Police Court, and the case being closed, judgment was given for the plaintiff. Appeal was taken upon this to the Supreme Court on points of law. On hearing in banco, the decision of the Court below was confirmed. Webster then advertised the goods for sale, when the present action was instituted and the sale suspended.

To sum up briefly the evidence adduced on both sides: On the 6th of August last, Messrs. Pease and Colborn, having received commissions and taken oath as Assessors, were gazetted

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as such, and proceeded to discharge their duties. Pease left with Waterhouse a blank assessment paper, to be filled up by him. Subsequently meeting him, Mr. Waterhouse said that he could not make a return, did not recognize him as Assessor, denying the validity of his appointment; that the Assessors did not after that think it worth while to call upon Mr. Waterhouse for his return, and proceeded in conference with each other, and guided by the estimates of others, to appraise his property; that the Tax Collector, having several times called for the tax as thus assessed, on the 7th of February went, in company with Mr. Sheriff Brown, to Mr. Waterhouse's store and distrained twenty English saddles, one Mexican saddle, twelve bundles flannel shirts, for the tax of \$253 12, and removed them to the Custom House. At this interview Waterhouse demanded of Webster his authority. The reply was that his authority was under the law, and that they had discussed that matter before. No authority was exhibited at that time. Captain Spencer, who was present, testified that he thought Waterhouse protested at that time that his assessment was too high.

Mr. Bates took the position that the plaintiff having made the admission that the goods were taken by the defendant, as Tax Collector, the burden of proof was thrown upon him of showing a wrongful taking; that it was to be presumed of every public officer that he is doing his duty; taxes were a debt due to the Government in return for the protection given; that Webster was not under the necessity of showing his authority or his tax roll; if he were, it would be impossible to make his collections; Webster was bound to collect according to that list as given him.

The Court held that the Tax Collector was bound to exhibit his authority so far as showing his assessment roll, just as a Sheriff must show his execution.

The commission of the Collector was put in; it was signed by R. G. Davis, acting for the Governor of Oahu, in his absence.

Mr. Harris said the law required that the commission should have the signature of the Governor and the approval of the Minister of Finance, and the commission was not good if done

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subsequent to the 10th of September, the date of the gazetting of Webster in the "Polynesian." The Court thought the commission was sufficient for a *prima facie* case to go to the jury.

The commissions of the assessors were also introduced.

Upon the point of making a return to the Assessors, the Court held that Waterhouse was obliged to make his return or be doomed, but that the Assessors were to devote their attention to it by ascertaining from others of what value they supposed any person's property to be, and that they might state how they arrived at it. They need not make a valuation from personal attendance; they would be trespassers if they went upon the premises. That Mr. Waterhouse would be perfectly justified in ordering them off.

The Collector, being duly authorized and provided with the tax list, it was then his duty to make collection—his power was mandatory. If he had no option in the matter, it was in the nature of an execution. The party aggrieved had his remedy against the Assessors, after paying under duress, and not voluntarily, if they in discharge of their duty have violated the law, or against the person who receives the money, if the law is unconstitutional and void, but not against the Collector, who is bound to do his duty under the assessment handed to him. (3 Metcalf, Boston and Sandwich Glass Co. vs. Boston.) The Collector had the power and authority to levy immediately upon the person or property of the party in the nature of an execution. Held that the authorities fully sustained the doctrine, that the authority of the Collector was in the nature of an execution and he was bound to obey it. And if it was wrong, other parties were responsible and not he—that he could not go behind the tax duties, that no other action would lie against him than for a violation of his own duties, not even for trespass. (19 Pick., Sprague vs. Bailey.)

Evidence was proffered that the Civil Code, of which the tax law is a portion, was invalid; because the Legislature which had enacted it had not been duly called by and with the advice and consultation of the Privy Council; because it did not consist of at least twenty-four members at date of passage of the Code; because the Code had not been promulgated according to its own provisions, and antecedent to the action of the Assessors and the Collector.

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The Court said it should hold here that, for the purposes of this act, Webster was justified by the law and bound to execute it, and that he was not bound to go into the question as whether it was invalid from any technical omission, and should rule that he was obliged to obey the law as promulgated; that he had no business to inquire into the doings of the Assessors; he was bound to obey his instruction.

The Court did not regard the Tax Collector as an integral part of the Government; he was obliged to give an account of every tax in his list, and if he omitted to do so he was liable; and it was purely a matter between the Collector and the tax payer. It was a specific office for specific purposes, which he must accomplish, and for which he was responsible, and no one else. That plaintiff was undoubtedly wrong in bringing an action against the Collector; that the Tax Collector was bound to levy, if there were goods to levy upon.

Chief Justice ALLEN charged the jury in substance as follows:

This is an action of replevin brought by the plaintiff for the possession of certain goods alleged to be seized by the defendant.

The defendant justifies the seizure, alleging that he was Collector of Taxes for the District of Honolulu, and that the plaintiff was indebted for taxes, as appeared by the tax list delivered to him for collection. The first question which arises is, is the defendant Tax Collector—with a legal appointment? His commission is from the substitute of the Governor, duly appointed to act during his absence;—this power of appointment is vested in the Governor by the Constitution. The commission is approved by the Minister of Finance, and bears date the 26th of October. If you are satisfied from the evidence that the Governor was absent on that date, his substitute had the power of appointment. The next question which arises in the case is, did the Governor deliver to the Tax Collector a copy of the tax list. It is made the duty of the Assessors to deliver to the Governors of the respective islands two copies of their tax list, one of which shall be forwarded by the Governor to the Minister of Finance. It is also made the duty of the Governor to deliver to the Tax Collector a copy of the tax list for his district.

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The question arises in this case, was the tax list delivered by the Governor to the defendant. It appears in evidence, by the testimony of the Registrar of Public Accounts, that the copy for the Tax Collector for this district was left in the office of the Minister of Finance, as had been the custom when taxes were collected under the old law by enumeration, and without any express authority from the Governor, he delivered the list to the defendant. You must be satisfied that the tax list was delivered by the approval of the Governor. It is not essential that the delivering was made by his express order, but if with his approval, it is sufficient. Of this you must judge. If you are satisfied that he is legally appointed, and has received the tax list, you will then examine the testimony and see whether he made a call on the plaintiff at his residence or usual place of business, or otherwise gave him notice to meet him at some convenient place in the district, to demand payment of his taxes assessed against him as by the tax list. This duty is incumbent on the Collector, and you must have satisfactory proof that the defendant had this legal opportunity to pay. It is contended that it was the duty of the Collector to have shown his authority. If you are satisfied that the defendant was known generally to the Collector, and he was acting in that capacity, I do not regard it necessary that he should show his commission to every tax payer, nor his tax list, unless a request is made to him, but when a request is made for the tax list, it is his duty to show it, and if you are satisfied that the plaintiff made this request and the defendant refused, it was a violation of the law, as I regard its spirit, and you must find for the plaintiff. Every tax payer has a right to see the tax list on request.

It is contended further that this call or notice to pay should be in the month of September, October, or November, or the claim for the tax is lost. The law makes it the duty of the Collector to make the call during these months, and to pay over to the Governor the amount of taxes by him collected before the last day of December, or he is liable to forfeit ten per cent. of his commissions; and unless before the first day of February he pays to the Governor the amount of taxes prescribed in the tax list, with the exception of the school tax, it is made the duty of the Minister of Finance to commence a suit on his bond.

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There is an additional provision to this effect, that he is held responsible for the full amount of taxes specified in the tax list, unless he shall file with the Governor a sworn list, giving the name, residence, and amount of tax, from whom, after using due diligence, he was unable to collect. The time for the call to be made is imperative on the Collector to fulfill the condition of his bond, but if there was an omission, it does not render the tax null and void. It is merely a declaratory provision, and not a condition precedent to the validity and legality of the law. You must be satisfied, however, that the call or the notice was made, before the seizure of the goods. This is a condition precedent, or an act to be done by the Collector before he is authorized to levy by distress on the goods of one who neglected to pay his taxes.

It is contended further, gentlemen, that the law had not been seasonably published. By the "Polynesian" of the 28th of May, the acts for the assessment of taxes, and the collection of taxes, together with the general provisions appertaining to the same, were published. It appears by the testimony of Mr. Whitney, that the entire Civil Code was published in the "Commercial Advertiser" prior to the first of October of the same year. The correctness of this testimony is not denied.

All laws, unless otherwise specially provided, take effect on the Island of Oahu ten days after their promulgation.

I have briefly given you a sketch of the duties and responsibilities of the Tax Collector. His bond is for the faithful discharge of these duties; but he cannot incur any obligation for the discharge of any other. The Collector is not responsible for the non-feasance or mal-feasance of the Assessors, or of any other officer. This tax list is in the nature of an execution against the person and property of the party, which he has no opportunity to contest, and in this stage of the case, he can no more seek a judicial decision on the question of his liability, than he can on an execution when the Marshal seizes the property or arrests the person. The execution is mandatory in his hands, and so is the tax list in the hands of the Collector. He has no discretion; he must make the levy, or he incurs a liability on his bond. It may be asked, what is the remedy of the tax payer? He may give notice that he pays under duress.

and not voluntarily, after which he can have his legal remedy against the Assessors, if they, in the discharge of their duties, have violated the law ; or against the person who receives the money, if the law is unconstitutional and void. But it is sufficient in this action for you to be satisfied that the Collector has done his duty. The law obliges him to make the distraint, and if he does it in conformity to its provisions, to which I have drawn your attention, no action can be sustained against him—if otherwise, he is liable.

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A verdict having been rendered in favor of the defendant, and exceptions being taken to the verdict, as contrary to law and evidence, and the said exceptions having been argued before the full Court ; the opinion of the Court was delivered by Chief Justice ALLEN as follows :

This is an action of replevin for certain articles of property alleged to be taken by defendant, who pleads the general issue, and also avowed the taking, under and by virtue of a tax list in his hands, as Collector of Taxes for the District of Kona, Island of Oahu.

At the trial before the Chief Justice, it appeared that the defendant had a commission of Tax Collector, and that the tax roll was delivered to him for the collection of taxes therein enumerated, and that the plaintiff had been called upon for the payment of his taxes, which he refused to make. Evidence was introduced to show the illegality of the assessment, but the Court ruled that the Collector was not answerable for the acts of any one but himself. It was contended by the plaintiff that no sufficient demand was made by the defendant for payment, and that the law under which the tax was collected, was not published in season to have force in this case and upon these parties. The Court instructed the jury that a demand was necessary ; that the law for the collection of taxes does not take effect till ten days after its promulgation ; and if they found that either was omitted, they must render their verdict for the plaintiff. The jury rendered a verdict for the defendant. There were many other points made at the time by

the plaintiff's counsel, which were overruled by the Court, but which will fully appear in the bill of exceptions.

It may be well to examine what the duties of a tax collector are.

After he has received a *copy* of tax list it is made his duty to proceed immediately in the collection.

He must call on each tax payer, or give notice for the tax payers to meet him at some convenient point. If any one refuses to pay, *he may levy on any personal property by distress*, and sell the same upon the order of the District Judge or Police Magistrate. And if no property is found, then such person, if able bodied, may be compelled to discharge the amount on the roads or public works.

His bond is for the faithful discharge of these duties, and no more. And if these are his only duties, he can not incur any obligation for the discharge of any other duty. The Collector cannot be responsible for the non-feasance of the Assessors, or his mal-feasance, or that of any other officer.

The tax list is in the nature of an execution, running against the person and property of the party, upon which he has no day in Court, no opportunity to contest it. He can no more seek a judicial decision on the question of his liability than he can on an execution, when the Marshal of the Kingdom seizes the property, or arrests the person. The execution is mandatory in his hands, and so is the tax list in the hands of the Collector. He has no discretion. He must make the levy, or is liable on his bond. What, then, is the remedy of the person assessed? It is to pay under protest; he may give notice that he pays it by duress, and not voluntarily, after which he has his remedy. The law under which the Collector acts obliges him to make the distraint. Such being the case, his duty is plain, and if he discharges it, no action can be sustained against him. And, in this action, this is the only question—whether he has done his duty under the law? (12 Pick., *Preston vs. Boston*, 14 p.; 17 Mass., *Amesbury Manf. Co. vs. Amesbury*, 461; 4 Met., *Bosteer & Lund vs. Boston*, 189 and 190; 19 Pick., *Sprague vs. Bailey*, 440.)

In Massachusetts, where the statute on this subject of furnishing a list is the same as ours, the Court have ruled, that

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where a person has not given in a list of his estate, the assessing of his property made by the assessors is so far conclusive that the tax payer is precluded from applying to the authorities for an abatement. In all cases where the party has furnished a list, application is made for an abatement to the assessors, with the right of appeal to the County Commissioners.

In case of neglect to furnish a list under their power of dooming, or estimating arbitrarily, as they must do, in the absence of the list or authoritative statement, which the tax payer is notified to make, they would be justified in increasing his personal tax, until he should think fit to give in such statement. (5 Cushing, Rep. 98, *Bates vs. Boston*.) Even if the case is as alleged, it is one of over taxation, for which the plaintiff is responsible, as he neglected to furnish the information within his own power to enable the assessors to make an accurate list. If there is an irregularity in the assessment, it will not vacate the tax list given to the collector. He is justified by the tax list, and the remedy when an injury is done may be against the assessors, who are responsible for their own personal faithfulness and integrity. (2 Greenleaf, *Huse vs. Meuean et al.*, 344; 10 Mass., *Coleman vs. Anderson*, 105; 10 Pick., *Little vs. Merrill*, 543.)

It is contended that the verdict is contrary to the law and evidence given in the case, inasmuch as the plaintiff made a demand on the defendant for the authority by which he acted, and that he produced none. It appeared in evidence that the defendant was regarded by the public as Tax Collector; his appointment had been announced in the "Polynesian" newspaper; and he had been furnished with the tax list; and on the trial he produced his commission from the Deputy Governor. It appeared further that the defendant went to the plaintiff's store and said to him, "I have called to collect your taxes," to which he replied that he should not pay; that the assessment was unequal and unjust; whereupon the defendant distrained property. It was in evidence that the defendant had previously notified him to call and pay his taxes, and had sent him a bill of the amount, and on the occasion of the distraint, the witness says, I heard plaintiff ask defendant for his authority, but he did not show it, but said his authority was under the law; and further remarked, we have discussed the matter before. The

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Court ruled that it was the duty of the Collector to show his tax list on demand, and the question for them to decide was whether he had done so. It is not necessary for a Collector to show a tax list every time he calls for the tax in those cases where he has made repeated calls. They would also consider whether the Collector had acted fairly and above board, for they would allow a liberal construction to his conduct. It was fully competent for the jury to infer from the evidence that he was fully cognizant of the Collector's authority; for he was aware of the amount of the tax, and there had been repeated conversations about the tax, and his chief complaint was that there was no proper assessment. I should infer from the evidence that, in his mind, as there was no proper assessment, therefore there was no proper authority, and not that the Collector was not duly commissioned, or that he had not the assessment roll. The Collector is liable for his duties only. It is true he must have a legal appointment and a tax list, and give the necessary notice for payment. He is justified by the tax list, even if the Court should be of opinion that the evidence was not sufficient to warrant the jury in giving a verdict for the defendant; still it is incumbent upon them to consider whether the distraint is not legal, although a demand was made of his authority and refused.

It is contended further that as the commission of the Collector was signed by a substitute of the Governor, it was necessary to show that the Governor was unavoidably absent at the time it was executed. It appeared in evidence that the Governor was absent on the island of Hawaii.

The article referred to in the Constitution is in these words: "The Governors, in case of sickness, or unavoidable absence, in all cases where no Lieutenant Governor has been appointed, have power to appoint substitutes, for whose official acts they are responsible." The article is designed to limit his power of the appointment of substitutes. It was evidently intended that the Governor should not appoint a substitute unless for good reason, of sickness or absence. The Court do not regard it necessary in this case to prove that the absence was unavoidable. If any proof was necessary, sufficient has been given to make a *prima facie* case. No rebutting testimony was given.

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On charges to impeach the Governor for mal-administration of his office, that he had appointed a substitute, he would doubtless be obliged to prove, in order to defend himself, that he did so, either when he was sick or unavoidably absent. It was not intended by the Constitution that his absence should be a moral or physical necessity, but it should not be such an absence as would be an evidence of trifling with his duty.

It was further contended that it was incumbent on the Collector to show that he did receive the tax roll from the Governor, or from some person authorized by him to deliver it. It is made the duty of Assessors, in the several taxation districts, to deliver to the Governors of their respective Islands, two copies of their tax list—and it is made the duty of the Governor to deliver to each Tax Collector a copy of the tax list for his district. This is directory to the Governor, and although in this case the delivery was by the Registrar of Public Accounts, by whom it had been made for some years, there could have been no doubt in the minds of the jury that the proper paper was delivered. At any rate, it is not contended that the Assessor's list is not genuine. We regard this objection as unsound in law.

It is contended that the Collector should exhibit his authority when demanded of him. The Court ruled that, if the tax list was demanded, it was his duty to show it, and this was submitted to the jury whether there was such a demand and whether it was complied with. The jury have settled this matter on this ruling, which the Court would here remark that, upon further examination, this would not be a requisite to a good execution of the process. It would, doubtless, subject the officer, on demand and refusal, to exhibit his authority to a forcible resistance—but it would not vitiate the execution of the process. (12 Met., 211, *N. Post vs. Cy. Com's.*; 6 Cushing, 477 ; 8 Cush., 55.)

The Collector is a ministerial officer, and, therefore, cannot be liable for acting in pursuance of legal authority. The Assessors are a tribunal, invested with certain powers, and have certain duties to perform, and the Collector, being duly appointed, has his authority from the tax list. This is the same in our law, as the warrant directing the Collector to collect the tax, as by the tax list accompanying, which is pre-

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scribed by the laws of many countries. The counsel have raised many objections to the discharge of the duties of Assessors, as well as to their appointment, but as we have already decided that the Collector is answerable for his official acts only, it is unnecessary to consider them.

In the case of *Howard et al. vs. Proctor* (7 Gray's Rep., 133), which was an action of tort, against a Collector of taxes for taking a horse, the Court says: "That the warrant being good upon its face, sufficient in point of form, and coming from an authority having jurisdiction of the subject, the defendant cannot be liable for its regular execution." This rule, applicable to executive officers, includes Collectors. A tax warrant, good upon its face protects the Collector acting under it, for he is not liable for the regularity of the meetings, town or district, or the validity of the votes by which the taxes were granted. (*Hays vs. Drake*, 6 Gray's Rep., 387.)

If the plaintiff suffered injury from the manner in which the Collector executed his duty, he has his remedy, but it is clear that it cannot be enforced in this action. It was, undoubtedly, the doctrine of the common law that chattels in the custody of the law could not be replevied. But I regard the same rule now to be, and which has been recognized for a long period, that goods taken in execution or in *custodia legis*, may be replevied, if they are the goods wrongfully taken of a person who is unknown to the process. For example, if an officer has an execution against A, and undertakes to execute it on goods in the possession of B, B may bring replevin for them—but this is not the remedy if they are the goods of A—for I regard an arrest by virtue of the tax list, by the Collector of taxes, as in the nature of an arrest at common law, upon final process. And a levy by distress upon the goods and chattels by the same authority, as in the nature of an execution. (5 Foster's Rep., 258; *Ilseley et al. vs. Stubbs*, 5 Mass., 282, and cases there cited.)

In the case of *Durham vs. Wychope*, 3 Wendell, 279, the Court recognize the principle that goods taken in execution are in the custody of the law, and cannot be taken out of such custody, when the officer has found them in, and taken them out of the possession of the defendant in the execution, applies

only between the defendant and the officer. There is great propriety and wisdom in this rule. There is no dispute as to the title of the property attached. It is admitted to be in the plaintiff. For illustration, suppose the property was taken in execution against the present defendant, would it be a wise provision of law to permit the debtor longer to delay the collection of the debt, by permitting the suit of replevin? He has had his day in Court, and a judgment is recovered against him, and execution issued thereon. If this is the rule of law as applicable to the collection of executions, how much more should it be in the collection of taxes, for the faith of the Government, and perhaps its existence, may depend upon the prompt payment of the taxes. The Statute declares that the Tax Collector may levy by distress upon so much of the goods and chattels of the said person, who neglects or refuses to pay his taxes, as he may deem sufficient for the payment of taxes and expenses of collection. This is in the nature of an execution, and as Chief Justice Shaw says in *Preston vs. Brookes*, 12 Pick., 14, running against the person and property of the party, upon which he has no day in Court, no opportunity to plead and offer proof, and have a judicial decision of the question of his liability. As a general rule the officer is bound to see only that the process is in proper form, and issued from a Court of competent jurisdiction. To accomplish the purpose of the law, and to give to Courts a prompt and energetic execution of the processes issued by their authority, there can be no other rule; and the same rule, which is applicable to executive officers, includes Collectors. (*Gray's Reports*, 133, *Howard et als. vs. Proctor*.)

In the case of *Abbot vs. Yost*, 2 Denio, 86, the Court says: "That a regular tax list, and warrant for a district tax, are a sufficient justification to the Collector when sued for taking the property of the person taxed, though the district meeting at which the tax was voted was illegal." In the case of *Kellar vs. Savage et als.*, 20 Maine Rep., 199, the Court say "that the Collector is bound to obey a warrant in due form, and issuing from the Assessors, though they may not have complied with every requisition of law anterior to issuing it."

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The principles on which this decision is made render it unnecessary to examine more in detail the objections of the counsel for the plaintiff.

Let judgment be entered for the defendant, with costs.

C. C. Harris, Esq., for plaintiff.

A. B. Bates, Esq., for defendant.

SUPREME COURT—IN EQUITY.

K. KAPAAKEA *et als.* vs. JOSEPH H. MORRISON AND KEOHOHIWA
HIS WIFE.

AS BETWEEN the seller and buyer, it is not the mere inadequacy of price, unaccompanied by other circumstances, which will avoid the contract in a Court of Equity. But where a party has held a situation of confidence, and has acquired information respecting the value and extent of the subject of the contract, and has not imparted it to his *cestui qui trust*, and uses it to his own advantage, it is sufficient ground for the interference of a Court of Equity; as for example, where the excess of land, over and above the extent represented by the buyer, was so great as to shock the moral sense, the difference being as between 1200 or 1500 acres and 50,000 or 60,000 acres.

Inadequacy of price may be sufficient ground for refusing to enforce specific performance of a contract, when it would not be for setting aside a sale.

ALLEN, C. J.

This is a bill in equity, filed by K. Kapaakea, A. Keohokalole, his wife, and David Kalakaua, to set aside, on the ground of fraud, the conveyance of a tract of land situated in the district of Hamakua, Hawaii, known as the Ahupuaa of Paauhau, made by the complainants to Joseph H. Morrison.

The bill sets forth in substance, that A. Keohokalole was possessed, in her own right, of the Ahupuaa of Paauhau, and that Kapaakea, her husband, was entitled to the usufruct of said land and to a curtesy therein; that Kapaakea and Keohokalole did, on the 17th of September, 1856, convey to their son, David Kalakaua, the said land of Paauhau, together with other

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estates, in trust, for the payment of the debts of Kapaakea, and for the benefit of A. Keohokalole ; that, subsequently, David Kalakaua visited the Island of Hawaii for the purpose of ascertaining the extent and value of Paauhau, in order that the same might be disposed of to the best advantage ; that he invited Joseph H. Morrison, the first named respondent, to come from Paauhau and meet him at Hilo, for the purpose of giving him correct information in regard to the land ; that said Morrison is the husband of Keohohiwa, the other respondent, who had previous to her marriage acted as superintendent of the land, and that her husband had exercised the functions of superintendent subsequent to the marriage ; that Kalakaua informed Morrison of his desire to sell Paauhau, and asked him what was the extent of it, to which he replied that it consisted of about twelve hundred acres ; that much of it was occupied by kuleanas, and that the character of the land was poor ; that after much conversation Morrison proposed to purchase the entire Ahupuaa, which he represented as twelve hundred acres, at the rate of half a dollar per acre, or six hundred dollars ; that Kalakaua, believing the representations of Morrison, sold him the land at that price, and on the 11th of November, 1856, executed and delivered the deed, describing the land by its name, which deed was subsequently executed by Kapaakea and Keohokalole, under the like impression as to the extent and value of the land ; that the land being encumbered by a mortgage to James I. Dowsett, an agent of Morrison made like representations to Mr. Dowsett as to the value and extent of the land, to induce him to release his mortgage ; that the representations made by Morrison were untrue and fraudulent in respect of the extent of the land, its quality, and its being much occupied by kuleanas, inasmuch as it contains about fifty thousand acres, is less occupied by kuleanas than is usual for large lands, and much of it being arable and productive ; that instead of being worth only six hundred dollars, it should be valued at about twenty thousand ; that Morrison has transferred a comparatively small portion of the land to John P. Parker for the sum of three thousand dollars, and several smaller portions to certain other parties, for sums unknown to the complainants ; that since the conveyance to him, Morrison has declared to sundry persons

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that he did not think he was purchasing so large a tract of land as it now appears is contained within the boundaries of Paauhau, but supposed at the time that he was purchasing only twelve hundred acres or thereabout. The complainants tender back the sum of six hundred dollars, being the consideration expressed in the deed of conveyance to Morrison, praying that said deed may be declared void; that said Morrison may be required to account for the moneys he may have received for the sale of any portion of the land; that an injunction may issue and that the respondents may be required to deliver up so much of the land as has not been transferred to *bona fide* purchasers.

The respondents in their answer admit that Keohohiwa has, since her marriage, but not before, acted as the nominal superintendent of Paauhau, but deny that her husband has ever acted in that capacity, although he has at times taken the trouble, gratuitously, to forward to Keohokalole the small sums of money received from time to time from the natives living on the land under the Konohiki. They admit that the respondent Morrison went to Hilo for the purpose of meeting Kalakaua, in accordance with the following note:

"OCTOBER 27th, 1856, Keaiwa, Kau.

SIR:—The mail for Kohala leaving to-day, I embrace the opportunity to write, and wishing you to meet me in Hilo by November and give some information of Paauhau, Ahupuaa in Kohala, my mother and father having appointed me their sole agent for all their property, both real and personal. Therefore if you would be so kind as to meet me in Hilo by November 9th, before my departure for Honolulu, bringing with you the yearly rent or lease of the land, if there is any; however, as much money as you can bring with you. Give my *aloha nui* and regards to Keohohiwa and the family.

I left Keohokalole at Kaawaloa, and since my absence in Kau nei, I received a letter from her informing me that Likiliki was very ill, but some expectation of recovering. My health is agreeable, and hoping yours the same,

I remain yours ever, D. KALAKAUA."

The respondents state that Morrison met Kalakaua at Hilo on the 8th of November, but that up to that meeting Morrison

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had no knowledge whatever of Kalakaua's intention to sell the land ; that at the interview Morrison handed to Kalakaua the sum of ten dollars, which had been received from native tenants, informing him at the same time that the income from Paauhau was very small, as most of the natives there had kuleānas, of which there were twelve or fourteen on the land ; that Kalakaua asked respondent if he knew how much Paauhau contained, to which he replied that he did not know, and that he had heard it never had been surveyed ; that Kalakaua then asked the respondent if he knew any person who would purchase Paauhau, to which he replied that he did not ; that Kalakaua then said to him, "Don't you want to buy it yourself?" to which respondent replied that he would give another land on Maui in exchange for Paauhau, but Kalakaua said he could not trade in that way, as Paauhau was mortgaged, and he wished to raise money to pay off the mortgage, adding that he would sell the land for the amount of the mortgage, which he said was about six hundred dollars ; that respondent, having established a home on Paauhau, was willing to purchase it, and then said he would give that sum for it, to which Kalakaua agreed after some reflection. The first named respondent positively denies that he stated in the conversation with Kalakaua, or at any other time, that Paauhau contained twelve hundred acres, or any other definite or ascertained quantity of land, or that he ever proposed to purchase it at a price per acre, or at all, until asked to do so by Kalakaua ; or that he was informed of Kalakaua's intention to sell Paauhau before being asked how much it contained, or that he misrepresented the extent, value or quality of said land. The respondent Morrison further avers that the deed of conveyance was not executed by Keohokalole or Kapaakea, "at his request," as he had no communication with either of them in relation thereto ; that the execution of said deed was not acknowledged by Keohokalole until thirty-nine days after the sale, nor by Kapaakea, until more than three months after the sale, showing that they had ample time for inquiry and deliberation before perfecting the conveyance ; that it is not true, as alleged, that any agent of his, or any person by his authority, ever represented to James I. Dowsett that the extent of Paauhau was twelve hundred acres, or any other definite quantity ;

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that, previous to his purchase, he had resided on his wife's kuleana, on the clear part of Paauhau, lying between the sea and the forest, and that he had no occasion to learn the extent of Paauhau, or how far it extended towards the mountain, or to explore the forest which covers the greater part of it, and that its ancient boundaries are up to this time unknown and undefined; that there are thirteen kuleanas, comprising about one hundred and thirty-seven acres, situated on the aforesaid clear part of Paauhau, some of which intersect the land in its entire breadth; that it is not true, as alleged, that any considerable portion of Paauhau is "arable and productive to the agriculturist," or can be made so at present, on account of its distance from a market or shipping port; and that the land is poor and poorly watered, yielding for the most part only a coarse, innutritious grass, not fit to fatten stock; and that the sum which he paid for the land was its fair market value at the time. Such is the case in substance, as set forth in the bill and answer.

This case has been argued with great care and ability. The testimony has not been especially complicated, and I do not regard it necessary to give it very much in detail, but shall confine my attention to such portions as bear upon the questions in which are involved the substantial merits of the case.

It is contended by the complainant that he was induced to make the sale by material misrepresentations of the respondent, who it is alleged stood in the capacity of agent, and before making any exposition of the general law of the case, I will in the first place confine my attention to the consideration of this allegation.

It appears from the answer and the evidence that this ahupuaa called Paauhau had been in charge of the mother of the wife of the respondent for many years, and at her death the superintendence devolved or was conferred upon the wife of the respondent, who acted as konohiki of the land. This kind of agency may be regarded as somewhat peculiar to the Hawaiian customs. It does not appear that the husband had ever acted any further than in aid of his wife, she being regarded by the owner of the land as the konohiki, and he had not been regarded as in charge, and I do not think any one should have the responsibilities of an agency unless it is defined and under-

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stood. For if a man is acting in a fiduciary capacity, and makes a contract greatly to his advantage, the law would regard it as fraudulent, unless it appeared that both principal and agent equally understood the nature and circumstances of the contract; for the agent must not conceal any facts within his knowledge which might influence his principal as to price or value. The question does not turn upon the point of intention, but upon the obligation, from the fiduciary relation of the parties, to make a frank and full disclosure. (1 Story's Equity Jurisprudence, 344; *Farmer vs. Brooks*, 9 Pick. Rep., 42.)

We are of opinion that this fiduciary relation did not exist between the parties by virtue of the agency of the wife. But it is contended that as the respondent was invited by one of the complainants to visit Hilo to give him information of Paauhau, and to bring the rent of the land then due, and he did visit him in pursuance of said request, that he is still bound to make true statements, and to conceal no information material to a full understanding by the complainants of their rights. This undoubtedly created a relationship of trust to the extent for which the communication was made between them, and renders his duties and obligations of a higher character. For by acquiescing in the request he assumed to act in conformity to it, and he must be held to a full and faithful discharge of his duty in the character and capacity in which he assented to act. He came to bring the rent and to give information, and it is very clear then that he must give the information within his knowledge, and conceal no facts material to the full understanding of the case, especially if any misstatement or concealment should redound to his own great advantage in maturing the contract for the same land, for information of which this interview at Hilo was solicited. What then is the testimony in relation to the negotiation? It appears the parties met at Hilo, and after some conversation about the land, its income, opportunity for its sale, extent, etc., Kalakaua asked respondent if he did not wish to buy it, whereupon a negotiation ensued; a contract was made, in pursuance of which a deed was executed. It is alleged in the bill that the respondent made this very material statement that the tract contained about twelve hundred acres, which is denied in positive terms by the respondent, and as contended

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for by him, the general rule of law is, when an answer to a bill makes a distinct denial, the proof of the statement must be sustained by two witnesses, or one witness and corroborative circumstances, which are equally convincing and of equal weight with another witness. It is necessary in this connection carefully to analyze the testimony.

The testimony of Penihassa Wood is, that he was present at the negotiation for the land between the parties; that he was clerk to Kalakaua, and lived in the same house with him at Hilo. That a letter had been sent from Kau by David to Morrison, and that Morrison came to Hilo in pursuance of the request in the letter, and after some conversation, David asked Morrison if he wanted to buy the land. They had some conversation between them in regard to a mortgage, and there was an apparent disagreement in their views. At that time David asked Morrison how large the land was. He said he was not certain in regard to that, but he judged it would be from 1,200 to 1,500 acres, and if David concluded to bargain with him, he thought six hundred dollars was a fair sum for it, it being at the rate of half a dollar an acre. Morrison also stated, at the same time, that the land was not so valuable on account of there being a great many kuleanas in it. Kalakaua asked Morrison if that was a good land for grazing purposes: the answer was, "not very good; it would do, perhaps, for bullocks." It was mentioned in the conversation that it was not very good for grazing purposes on account of the kuleanas, which made it troublesome. Mr. Morrison made that observation. David asked Morrison if he knew of any body else who wished to purchase that land. Kalakaua asked him if there was any person at Waimea or about there that would be likely to buy the land. Morrison answered that he did not know of any person who wished to purchase it. Cannot say whether this conversation was before or after David's proposition to Morrison to buy. The conversation was all at one time. On the cross-examination he says that the conversation in regard to the number of acres was subsequent to that in regard to the price; but, subsequently, he says, when he heard David ask Morrison if he wanted to buy the land of Paauhau, I only heard there was a mortgage of \$700, and that David offered to sell

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the land for the amount of that mortgage. It was in the course of that conversation that the quantity of land was mentioned, but I cannot say which was mentioned first. Morrison offered \$600 for it. I cannot say whether the dollars were mentioned first or the acres; cannot say whether Morrison said anything about the land not having been surveyed, he might have done so, but I don't know. H. A. Kahanu was present the whole time of the conversation. Kahanu says that he went to Hawaii with Kalakaua in 1856, and that they visited Hilo on the same tour, and that he stopped in the same house with him. He states substantially that he heard a conversation between Kalakaua and his clerk in relation to the land, and he remonstrated with Kalakaua for selling the land. "I then remarked to Kalakaua that I had sold a land in Kau, a very poor and rocky land, for \$700. Kalakaua said to me, 'This is cheaper, because there is only twelve hundred acres.' I then told Kalakaua, saying, I have heard that the land on this side is all good land; but on the Kona and Kau side it was all rocky. Mr. Morrison was there and heard the conversation. Then David addressed himself to Mr. Morrison in English, and asked him how many kuleanas there were on that land. Morrison said there were ten or more, and I then endeavored to persuade Kalakaua not to sell, as it would be a loss to him. David then asked Morrison how much land there was remaining not taken up in kuleanas. Morrison said there was from 1,200 to 1,300 acres perhaps. Then David instructed his clerk to prepare the papers to be sent somewhere to Keohokalole."

The testimony of Judge Austin is to the effect that he was present at Mr. Coney's office, where the agreement for a deed was drawn, but he does not remember the conversation. He says: "I understood at that time that the land had been sold for \$600 to Morrison, and that Coney was drawing up the agreement for the deed. Did not know anything about the size of the land at that time. Don't think I heard any conversation between Kalakaua and Morrison before or after that time. I said nothing in negotiating the release, except that it was a large land." In the cross-examination he says: "I had several interviews with David when I was negotiating the release in January. Nothing was said at that time about any

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definite quantity of land. I don't recollect that acres were ever mentioned by David at any time. Nothing was ever said by David at any time about the land being sold at any price per acre. I gathered from the conversation that he had sold Paauhau." In relation to the release from Mr. Dowsett, he says: "I afterwards saw Dowsett, and after considerable negotiating he consented that if he received \$640, or the amount of the mortgage which he had actually taken up, he would release it. David consented that \$595 should be paid to Dowsett and \$5 which he had received before, and I gave \$40 out of my pocket and gave it to Dowsett to secure the title. He said he believed he was doing it blind. I said it was a large land. It is reputed to be a large land. Paauhau was reported to be a large land. I never mentioned in my interview the amount of acres of Paauhau. I never heard it estimated in acres; but I considered that there were several thousand acres."

The testimony of Kaii is to the effect that he saw Mr. Morrison on his return from Hilo, and in conversation he stated that he had purchased Paauhau for \$600, and he thought it a good bargain, for he thought the quantity was between 50,000 and 60,000 acres.

Kahina swears that Wood and Kahanu were present at the time that Morrison was at Kalakaua's.

Mr. Dowsett, who held the mortgage on Paauhau, says at the time he gave a release, the land was treated as being 1,200 or 1,500 acres, and that he gave it the quit claim supposing it to be 1,500 acres.

The testimony of Mr. Low is, that the distance from the sea to the forest is about three miles. He regarded it as a poor tract of land, and that Mr. Parker's purchase embraced four-fifths, and he is of opinion that if Mr. Parker had not lived there, that he could not have found a purchaser for a large price—for a much larger price than Mr. Morrison gave for it. Morrison, on examination, said he had more land than he supposed.

He estimated the quantity at 30,000 acres; but he says it is almost impossible to judge of quantity, and he would not pretend to give an opinion with any degree of accuracy.

Mr. Coney says, at the time the agreement was made there

was no quantity stated, Mr. Morrison stating that "the land had not been surveyed, and we don't know how many acres there are," but it was understood that the whole of Paauhau was included in the purchase. He testifies that he saw Wood and Kahanu riding about Hilo after Mr. Morrison left his house to go to see Kalakaua; never saw Kahanu before seeing him at Hilo. There is a conflict of evidence in relation to their presence at the negotiation, but they swear positively they were there.

There was the evidence of Puupuu, who swears that Wood and Kahanu were not present when Morrison and Kalakaua were negotiating, and that he saw Kahanu go into the house while they were there.

This is an illustration to some extent of the difference of weight to be given to positive and negative testimony. The Court have very carefully considered its merits in connection with all the circumstances of the case and will apply to it the principles of law which should govern Courts of Equity.

In a proceeding in Equity to set aside a sale of land for fraud, the person who is most benefitted by the sale is in a situation to be suspected of it, if a fraud is actually committed. If such person makes statements as to material matters connected with the value of the land, and which from being within his own private knowledge, or other circumstances more clearly relied on by the purchaser, and they turn out to be false, the sale is void, whether he believe them to be true or not. (*Smith vs. Babcock*, 2 Wood and Minot's, 246.) These are recognized principles. In this case the respondent made statements in a matter material to the value of the land, to wit, as to its quantity; and it is clear that its quantity was far more within his private knowledge, for he lived on the land and his wife was its Konohiki, and the daughter of her, who had been so before her, and in addition he was surrounded by people living on the same land, and who must have had a general knowledge of its extent. His residence and these relationships affording such means of a reasonable judgment, would have very naturally impressed any one with a strong conviction of an approximating accuracy of statement.

Hilliard, an eminent writer on the law of venders and pur-

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chasers, regards the doctrine as now well established that actual misrepresentation avoids the sale, even though made through the ignorance of the seller himself. In the case of *Doggett vs. Emerson*, 3 Story's Rep., 659, Mr. Justice Story says that a seller is bound to act with the utmost good faith, and if he misleads the purchaser by a false or mistaken statement as to any one essential circumstance, the sale is voidable. I cannot entertain a doubt that the sale was made upon the credit given to the representations made by the purchaser of the quantity and quality of the land. The purchaser lived on the land, and his wife and her mother have had charge of the land for many years, and it seems incredible that they should not have known that it contained a quantity far greater than represented, for his residence was some distance from the sea, which was the boundary, so that there were several hundred acres between him and the sea, and extending many miles to the interior. In the case to which I have referred, Judge Story says that he who misleads the confidence of another by false statements in the substance of a purchase should not profit by it.

It is very clear that there was great inequality in their situation—the one with every means of knowledge from his residence and relationship, and the other, although the owner, still residing in Honolulu, and relying upon the respondent, who was the husband of her who had charge of the land, and whom the complainant addressed in his note to meet him at Hilo, on the subject matter of the land, and desirous of making a sale on account of the mortgage to Mr. Dowsett. Although I do not regard the respondent as acting in a fiduciary capacity, and would not avoid the sale technically on that account, still he was equally bound in honor and good faith to have made a full and fair statement, and one which he knew to be true, or he should have made none. The evidence is that he made the statement that the tract contained twelve or fifteen hundred acres, when on his return from Hilo he stated that he thought he had made a good bargain for \$600, believing the quantity fifty or sixty thousand acres, and in July following he writes to Mr. Gaskin that he has become a great landholder of fifty to sixty thousand acres, and the lowest estimate by the respondent's testimony is thirty thousand, and of course it was a mis-state-

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ment, and that he must have known that the tract was large—far larger than the representation—the circumstances to which I have referred already, are most convincing.

It is very clear from the evidence of Mr. Dowsett that the complainant supposed he was selling the quantity of land alleged to be represented by the respondent, and Mr. Dowsett, who was the mortgagee, acted under the same impression. What then was the duty of the respondent when he discovered that there was this extraordinary excess in quantity so much beyond his expectation when he purchased, especially when we take into consideration the mode and manner in which the bargain was made and the relationship in which he stood to the complainant, and especially the circumstances in which he stood to him on that occasion? On the ground that both parties were equally innocent and equally mistaken, the law would set aside the sale. In the case of *Evans vs. Llewellyn*, 2 Bro., C. C., 150, the doctrine is held that a conveyance obtained from persons uninformed of their rights is set aside, though there was no actual fraud or imposition. In this case it is very clear that the complainant was uninformed of his rights, and if there was no proof of misrepresentation, in a bill in Equity, making this the ground of relief, a Court of Equity would set aside the sale, unless the party was clearly and distinctly put on his guard. The most common mistake in sales of real estate relates to the quantity of land conveyed, as compared with the agreement or intent of the parties upon that subject; and I regard the doctrine to be this, that when a contract has been consummated without any fraud, misrepresentation, or concealment as to the quantity, the Court will not inquire whether there has been a mistake upon that point. (*Veiden vs. Fondo*, 3 Paine, 94.) So when a purchase is made and a deed given for so many acres more or less, and it turns out that there is less by actual survey than the estimated quantity, the buyer will not be relieved. But when a tract of land is sold for a sum in gross, the boundaries control the description of the quantity, neither party can have a remedy against the other for an excess or deficiency, unless it is so great as to furnish evidence of fraud or misrepresentation. (1 Hilliard on Venders and Purchasers.) But in this case the sale of the land was made in gross, without the aid of

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boundaries as a basis to calculate quantity, and the excess was so enormous, that without misrepresentation, it would come within the principle that it furnished, *per se*, evidence of fraud or misrepresentation. But if the excess had not been so great as to be beyond all amount contemplated, there could be no relief. This matter of excess beyond what could have reasonably been contemplated depends very much upon the nature of the tract of the land—an excess in a mountain tract, of comparative little value per acre, might be reasonably contemplated, as in this very case, when such a proportional excess would not be in lands fit for the cultivation of sugar. In the case of *Vaules vs. Craig*, 8 Cranch, 371, it appeared that the owner of a land warrant had obtained a survey for 2,000 acres, and he transferred the same for a valuable consideration and assigned the plan and certificate to the purchaser, whereupon he obtained a patent in his own name; and after a re-survey, it appeared that the grant contained 2,700 acres, the vender failed to support a claim in equity for the overplus against the vendee. In the case of *Harrigan vs. Talbot*, 2 Dana, 258, a difference of 33 per cent. between the actual and estimated quantity sold in the gross was held to raise a presumption of such mistake, and give a claim to relief in Chancery. In the sale of a tract of land of the character of Paauhau, extending from the sea to the mountain, a Court of Equity would not interfere, unless the excess was so great in comparison to the consideration received as to shock the moral sense, and to convince any man of sense at the first blush that it furnished evidence of fraud or misrepresentation, or a mistake that should be rectified, with as much reason as when such a sale is made as given in Lord Raymond before referred to. In *Belknap vs. Paley*, 2 Duer, 570, when a party has been induced to purchase land by the unintentional misrepresentations of the seller as to quantity included within the boundaries, the deficiency being material, equity will rescind the contract; and this, though the complainant seeks relief upon the ground that the representations were fraudulently made, if the answer admits a mistake as to quantity. (Secs. 2, 3, Hilliard, vol. 1, 336.)

The quantity here is so disproportionate from what the seller supposed there was, differing from twelve to fifteen hundred

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acres to from thirty to fifty thousand acres, and the error is so fundamental that it would be gross injustice to sustain the contract. Were the error in quantity of a slight nature, we should not regard it of sufficient moment to set aside the conveyance, but with the circumstances of this case, neither the principles of law or justice can sustain it. In the case of *David vs. Mitchell et als.*, 1 Story Rep., 172, the doctrine is fully sustained that a bargain founded upon material misrepresentations of matters of fact, even though they were inadvertently made through the mutual mistake of the parties, or by the mistake of the grantees alone, will be annulled in equity. Whenever a person has held a situation of confidence, and has acquired information respecting the value of the subject of the contract, and what he has not imparted to his *cestui que trust*, and uses it to his advantage, it is sufficient ground for the interference of equity in cases when if no such confidence had been reposed equitable relief could not be given.

The Court do not hold that, *per se*, this sale is void from the relationship of husband and wife, who is the superintendent of the land, in accordance with a usage somewhat peculiar to this people, but we regard it as an incident in the transaction of some moment, and, like inadequacy of consideration, has material weight with the other circumstances of the case, so that in summing up the whole case it presents this statement: Paauhau was many years ago placed in the charge of the mother of the wife of the respondent, so that she was known and regarded as its *konohiki*, and after her death this supervision was assumed by the daughter, who continued to exercise it till the sale. The respondent, after his marriage in the year 1852, took up his residence on a *kuleana* of this tract of land, some distance (two or three miles) from the sea, and has continued to reside there ever since. In October, 1856, Kalakaua addressed a note to respondent requesting him to visit Hilo and give him what information he could in relation to the land, and to bring him what money he could; he complied with this request, and carried him ten dollars, all the income of the land then collected. What was the respondent's duty at this interview, called as he was to give information? He should have fulfilled this obligation in the first instance by giving all the information within

his power, and placing Kalakana in the same situation with himself on the scale of knowledge, and a negotiation could not properly follow for its purchase till this had been done. He came to Hilo in pursuance of this request, and it was a *suppresio veri* to have concealed any information he had of the land. What had been his means of information? His residence on the land, his acquaintance with the country round, his association with those who had known the land for many years, and in whose supervision it was at that time; how can it be possible that he should not have known that this vast tract which he soon after regarded as fifteen or sixteen miles in extent, and containing fifty or sixty thousand acres, should have been limited to twelve or fifteen hundred acres? But admit, for the sake of the argument, that he did labor under this extraordinary error at the time, what was his duty after he discovered the extent of his purchase, so contrary to what he knew was Kalakaua's understanding of the case at the time of sale, as well as that of Dowsett, when he relinquished his mortgage? Was it not clearly to have offered a re-conveyance, on the ground of error; for, after the discovery, it became a fraud to hold on to the bargain under such circumstances? This doctrine is laid down in the Court of Chancery in England, in the case of *Reynolds vs. Sprye*, Vol. 13 English Law and Equity Reports, pp. 113, 114, where Lord Cranworth says as follows:

“Where, therefore, in a negotiation between two parties, one of them induces the other to contract on the faith of the representations made to him, any one of which has been untrue and known to the party so to be, the whole contract is in this Court considered as having been obtained fraudulently. Who can say that the untrue statement may not have been precisely that which turned the scale in the mind of the party to whom it was addressed? The case is not at all varied by the circumstance that the untrue representation, or any of the untrue representations, may, in the first instance, have been the result of innocent error. If, after the error has been discovered, the party who has innocently made the incorrect representation suffers the other party to continue in error, and act on the belief that no error has been made, this, from the time of the discovery, becomes, in the contemplation of this Court, a

fraudulent misrepresentation, even though it was not so originally.

"These are all principles of such obvious justice as to require neither argument nor authority to illustrate or enforce them, and they need but to be stated in order to command immediate assent. The only question can be in each particular case, how far the facts bring it within the principle.

"However negligent the party may have been to whom the incorrect statement has been made, yet that is a matter affording no ground of defense to the other. For no man can complain that another has too implicitly relied on the truth of what he has himself stated."

The authorities regard representations of material facts, known to be false, or not known, whether they are true or false, as the same in legal effect; for the affirmation of what one does not know to be true is as unjustifiable in law as the affirmation of what is known to be false, and especially under the circumstances in which those statements were made. No man can be justified in making false and rash statements to complete a contract of great advantage to himself. (1 Story Eq. Jur., 193; *Ainslie vs. Medlycott*, 9 Vol. Pick., 21; *Pearson vs. Morgan*, 2 Bro. Ch. R., 389; *Collins vs. Harrison*, 12 Met. Rep. 549.) If misrepresentations are made, when parties are in treaty upon the subject matter of a sale, and which are the inducement to complete it, the inference is that they were made for this purpose. There was evidence in relation to the situation and quality of the land, but the Court have not regarded it material in the consideration of this case, as the extraordinary difference in quantity between the amount on which the bargain was predicated, and the amount in proof, is sufficient ground to avoid the sale and give relief, when the whole circumstances of the sale and the principles which govern Courts of Equity are regarded.

In the case of *Cockell vs. Taylor*, *Callet vs. Preston*, *Preston vs. Collett* (English Law and Equity Reports, vol. 15, page 101), the Master of the Rolls, in giving judgment, says, "Coupling this inadequacy of price with the other circumstances of the case, the question I have to determine is, whether this is a transaction which this Court can allow to stand. It is not

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my intention to lay down that any inadequacy of price, unaccompanied by other circumstances, will avoid a contract, unless, perhaps, it be similar to that referred to by Lord Hardwicke as having occurred in the case of *Jones vs. Smith* (1 *Loving*, 111, and 1 *Keble*, 569), and *Thornborough vs. Whitacre* (6 *Mod.*, 305, and 2 *Raymond*, 1,164) where a man, supposing that he was buying a horse for a few barley corns, had in reality contracted to give 500 quarters of barley for a horse worth £8. It is, in fact, evidence of fraud, but standing alone, by no means conclusive evidence ; and if a purchaser with his eyes open, without concealment or deception on the part of the seller, choose to give ten times the value of a property, it is far from my intention to say anything that can lead to the supposition that this transaction can be impugned." A. B. being desirous of raising money to enable him to prosecute his claim to a fund in Court, applied to a solicitor for that purpose. An agreement was executed, by which the solicitor agreed to lend £1,000, and A. B. agreed to purchase from him some land for £6,000 (ten times its value). The land was conveyed, and the funds in Court mortgaged by A. B. for the £6,000 ; but the £1,000 was not advanced at the time. The Court, on the ground of the gross inadequacy of value, coupled with the other circumstances of the case, set aside the whole transaction with costs.

It has been contended by the learned counsel for the respondent that the Court should regard the sound distinction recognized in Courts of Equity between the defense to a bill for specific performance, and that for rescinding the contract. This is a true distinction ; for inadequacy of price may be sufficient ground for refusing to enforce specific performance of a contract, when it would not be for setting aside a sale, and the parties would be left to their legal remedies. (*Osgood and Franklin*, 2 *Johns.*, chap. 1, 23.)

In the case of *Davidson vs. Little* (22 *Penn.*, 245) the Chancellor refused to interfere where a contract had been executed by declaring it void on the ground of inadequacy, except in the case of an heir expectant. So in the case of *Clitheral vs. Ogilvie* (1 *Desaus*, 250), the Court refused to decree specific performance of a sale, when the inadequacy of price was very

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great, though there was no direct fraud or imposition, the seller being a young man, just of age, ignorant of the value of the land, and having acted somewhat precipitately on being urged. The authorities unquestionably sustain the doctrine that a Court of Equity may refuse to enforce an agreement for inadequacy of consideration, yet the inadequacy must be so great as to be evidence of some unreasonable advantage, amounting to evidence of fraud. Lord Thurlow says that the bargain must be such that it will be impossible to state it to a man of common sense without producing an exclamation at the inequality of it. In the case of *Seyman vs. Delancy* (3 John Ch. R., 445), the Court maintains the doctrine that the inadequacy must be so great as to shock the moral sense of an indifferent man, if the contract is entered into deliberately and fair in all its parts, otherwise it is no objection to its being executed. From the fluctuation of prices it is very clear that it would be unsound and unfair to set aside a conveyance of property on this ground alone ; there must have been deceit against which ordinary prudence could not protect. In the case of *Griffith vs. Spratley* (1 Cox, 383), Eyre, Chief Baron says that, if Courts of Equity were to unravel all these transactions, they would throw everything into confusion, and set afloat the contracts of mankind.

When a party has been induced to purchase land by the unintentional misrepresentations of the seller as to quantity, the deficiency being material, equity will rescind the contract, and this, though the complainant seeks relief upon the ground that the representations were fraudulently made, if the answer admits a mistake as to the quantity—(*Belknap vs. Sealey*, 2 Dace, 570.) In this case the answer does not admit a mistake although the evidence fully proves that there was a far larger tract even than the respondent supposed he was purchasing.

The general doctrine is admitted on all hands that when the quantity of land is knowingly misrepresented by the vender, the contract is not obligatory on the vendee, though the land be sold in gross, or by certain boundaries. In the case of *Smith vs. Babcock* (2 Woodbury & Minot, 246), it is declared that if a person makes statements as to material matters connected with the value of the land, and which, from being

more within his private knowledge or other circumstances, were clearly relied on in the purchaser, and they turn out to be false, the sale is void, whether he believe them to be true or not. It is not contended that the original design of the respondent was fraudulent, but if afterwards he deviated from his duty, and made misrepresentations, which influenced the negotiations greatly to his own advantage, it would be, in point of law, a breach of trust, involving a constructive fraud, against which a Court of Equity ought to give relief.

It is further contended that the complainant's culpable neglect, in not ascertaining with some degree of accuracy the extent and value of his land, was a bar to a recovery. All courts sustain the doctrine that when the negotiation is fair, and the parties equally innocent, and the quantity is by estimate and not by measurement, that, the sale should be confirmed—and this is the principle upon which this case depends.

Was the negotiation a fair one? Were the parties equally innocent?

His wife was the konohiki of the land. According to an Hawaiian custom, she received this agency, her mother having been the agent before her; he lived upon the land; is it not an inevitable inference that he knew that it was a large land, and contained a far greater quantity than 1,500 acres? The lowest estimate is that the tract contains 30,000 acres—and others estimate it at 50,000. With this knowledge, and the relationship which existed between the parties, even if there was no legal agency on the part of the husband, still it imposed upon him a duty to be frank and open in his statements. If the law could regard him as responsible for the agency of the wife, a Court of Equity would regard the transaction as fraudulent *per se*, but we are not prepared under the circumstances of this agency, which is peculiar to the Hawaiians, to impose upon the husband the liabilities which are incurred by the common law, and we do not therefore regard this relationship of itself, not sustained by other evidence, as sufficient to sustain the complaint, and render the contract void.

The answer is full, and direct in its denial of the fraud and misrepresentation, and nothing but the clear and decisive tes-

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timony of two witnesses, or by other evidence quite equivalent, ought to outweigh such an answer. The testimony of Wood, and Kahanu, and of Dowsett in corroboration, the circumstance of his residence on the land, and the inevitable inference of an approximate knowledge of quantity, from the fact of his wife having the supervision; and his knowledge of the country and his letter to Gaskin, all show that his statement was recklessly made, and considering his relationship to the complainant, were calculated to gain his entire confidence.

The Court is aware that the estimate of quantities is always uncertain, and the Court would not regard any considerable amount of difference in this case as evidence of misrepresentation; but, can the human mind believe that a person who lives on an ahupuaa of land of 30, or 50,000 acres, with all the means of information which he had, could make a mistake of this enormous extent. Besides, if he did not know, he should not have made a statement calculated to mislead, and if he did know he should have stated truly; for nothing is more clear in equity than that a sale based on misrepresentation of what is material to the bargain, must be set aside.

We are therefore of the opinion that the contract of sale, and the conveyance of the premises as set forth in the bill, ought to be set aside, and held null and void; but as a portion of the land had been sold and conveyed by the respondent to innocent purchasers, previous to the filing of the bill, the Court are of opinion that the respondent pay to the claimant the amount of money he has received from said sales, less the amount he paid to claimants, and re-convey to them the residue of said Paauhan.

The Court have bestowed some especial attention to the subject of the balance of interest and cost, and have to remark that we regard the case of a vender as contra-distinguished in some respect in an application for relief from that of a vendee, and although the complainants were justified in relying upon the representations of the respondent, and for which he is responsible, yet in view of all the circumstances of the case, we are of opinion that interest should not be allowed on either side of the account, and that each party should pay the cost he has incurred. Reference will be made to the master to state the account, and

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a decree will be drawn in conformity to the foregoing principles.

A. B. Bates, C. C. Harris and R. G. Davis for complainants.
J. Montgomery and J. W. Austin for respondents.
June 12, 1860.

SUPREME COURT.

IN THE MATTER OF J. H. MORRISON.

A PARTY respondent, kept in custody under process of attachment for non-compliance with the final decree of the Court, sitting as a Court of Chancery, prayed to be discharged, alleging want of funds, and that he had remitted a large amount, subsequent to the filing of the bill, to his kindred in a foreign country.

Held, that a contingent liability having arisen against the respondent by the institution of the suit, it was his duty to have kept his property in the Kingdom to enable him to meet whatever judgment might be awarded. Petition dismissed.

ALLEN, C. J.

It appears that the petitioner is held in custody by virtue of an attachment, issued by this Court, because he failed to obey the final decree of said Court, sitting as a Court of Chancery, in the case of *K. Kaapakea et al.*, against him, whereby he was ordered to pay the plaintiffs the sum of twenty-five hundred and sixty dollars.

This decree was made upon a complaint of the plaintiffs, in which they allege fraud on the part of the defendant, the present petitioner, in the purchase of a tract of land, and prays that the defendant may be compelled to pay them the money which he has received from sales which he has made prior to filing of said complaint; and to reconvey to them that portion of the land which he has not conveyed to innocent purchasers, without notice.

An injunction was made at the time process was issued on said complaint, forbidding him from making sales, or committing trespass thereon. The foregoing amount is what the

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defendant has received from the sales of the land, less the amount of the purchase money paid by him.

And now the petitioner prays to be discharged from said arrest, because he says that he is unable to comply with the decree. He alleges that he has disposed of the money which he received from the sale of the land by paying a debt to his father, who resides in Pennsylvania, to the amount of ten hundred and sixty dollars ; that he also remitted him four hundred and fifty dollars for the benefit of his sister ; and that at another time, and subsequent to the service of the bill in equity, under which the final decree of this Court was issued, "he remitted to his father the further sum of fifteen hundred dollars as a contribution towards the support of himself and daughter, and as some solace in his declining years." He further represents that he is informed and verily believes that his father is unable to return any portion of the amount remitted him.

It is contended by the counsel for the complainants in the bill, and in whose favor the decree was made, that the Court has not power to vacate the attachment ; that having been once issued it is beyond reconsideration and recall. The Court does not regard this as a sound legal view of this process. The decree was made by the Court, and notice given to the defendant to comply with it, which he failed to do ; the complainants by one of their counsel present a petition, in which he alleges, on oath, that he is advised and believes that the said petitioner does not intend to comply with that portion of the decree which requires him to pay money which he has received from the sales of the land, namely, the sum of twenty-five hundred and sixty dollars ; and further, he is advised and believes that the defendant has made such disposition of the money as in the opinion of said petitioner will prevent the plaintiffs from obtaining said money. Whereupon a process of attachment was issued ordering the Marshal to keep him in custody till he had complied with the final decree made in said cause, or be discharged by order of Court.

This process does not preclude the party from coming into Court and procuring his discharge, if the allegations upon which the party was arrested proved to be untrue. And the question becomes a very simple one, both in law and morals : has the

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petitioner made a wrongful disposition of said money which will preclude the plaintiffs from obtaining the amount decreed, or any portion of it? He alleges that he has given fifteen hundred dollars to his father, after the service of the complainant's bill upon him, "and he is informed and verily believes that his father is quite unable to return any portion of the amount so remitted him," and that "he, the petitioner, is absolutely destitute of means wherewith to pay any part of the amount decreed against him."

The Court cannot relieve a party who seeks to avoid the payment of his debts or liabilities, either by transferring his property to a third party, or of removing the same out of the jurisdiction of the Court. The principles of law, of equity, and the provisions of our Civil Code give this protection to creditors, and the question arises, what is the evidence that he intended to evade the payment of the amount awarded by the decree? It is admitted that the bill was filed; that the claim was asserted before he sent to his father the last amount of fifteen hundred dollars. He was then aware that at least a contingent liability was upon him, and it was his duty to have kept his property in the Kingdom, or at least under his control, to enable him to meet whatever judgment might be awarded against him. Had this money been used in the ordinary course of business, it would have presented a different case. But it would be a perfect dereliction of duty in a Court, to justify men in sending their money or other property out of its jurisdiction, and thereby evading their liabilities within it. It seems somewhat singular to me that counsel can seriously address a Court, and ask for a discharge on the ground that the party has given his money to his kindred in a distant country. The laws of this Kingdom must be enforced, and the rights of its citizens secured, or the administration of justice is a mockery. Had the petitioner disposed of this money before he was aware that claims were instituted, or would be instituted against him, or had he lost the money in the regular course of business by misfortune, or should tender security for this amount, it would present a very different case. But when the claim was asserted and the bill filed in Court, how can he justify himself for sending beyond the jurisdiction of the Court all the means he had

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to respond to the decree which might be given against him—and especially the very money which this suit was instituted to re-claim. If security for this amount was tendered it would present a very different case—but as it now stands on the present hearing, on the statements of the petitioner himself, and his counsel, it is a claim for a release from arrest because he is unable to pay, when that inability is created by the remittance of money as a present to his kindred in a distant country. Can donations be made and liabilities repudiated? The law teaches a different doctrine.

It is further contended by the counsel for the petitioner, that the injunction was issued, forbidding him to make sales of the land, or committing trespass thereon—but as he was not enjoined from sending the money which he had received from the sales of the land, out of the jurisdiction of the Court, he should be excused for doing it. This would be a new application of the writ of injunction—of its force, when referring to money in hand, there would be much question. It has a decided force when its object is to prevent the sale of land, or trespass thereon.

The bill gave full notice of the claim, and it seems somewhat singular to require a writ of injunction to notify persons against whom suits are pending, not to send their money out of the jurisdiction of the Court, or they will be excused from so doing. The books furnish no such precedent, and it will hardly commend itself to the common sense or common honesty of mankind. Petition dismissed.

Mr. Montgomery for petitioner.

Mr. Bates for respondent.

September 6, 1860.

P. S. Wilcox and F. L. Hanks v. J. F. B. Marshall.

SUPREME COURT—OCTOBER TERM, 1860.

P. S. WILCOX AND F. L. HANKS vs. J. F. B. MARSHALL.

WHERE one of several part owners of the ship or ships, engaged in the whaling business, acts as agent to purchase supplies and outfits for the ships from third parties, he will not be permitted to take beyond a reasonable compensation for his services (or that agreed upon), nor to hold any profits incidentally obtained in the execution of his duty, even if sanctioned by usage.

Where said part owner had furnished the supplies for the said vessels from his own stock in trade at the lowest market rates, with the knowledge of and without objection by the other owner, the latter must be held in law to have waived his right to open up the accounts of said disbursements, they having been furnished him according to the usage of the business.

Where said part owner, acting for the others, furnished them, from time to time, with accounts of the disbursements, and charged interest on advances made by him in fitting out the vessels, without having first made a demand for contribution; *Held*—That the furnishing of the accounts must be regarded as notice to the said part owners and equivalent to an express demand, rendering them liable for interest from the time the accounts were so furnished.

An agent or trustee can not become the purchaser of property confided to his care. Such sale not absolutely void, but voidable by the *cestui que trust*.

A party can not ask for gains for which he has incurred no hazard and made no contribution.

Although agents are not legally entitled to any incidental profits, arising from the management of the business confided to them by their principals, yet, where it appeared they had exercised due diligence in making their contracts of freights, and made the most advantageous bargain they could, their principals could not vacate their contracts or make them liable, if at some other period, before or after, a less rate of freight had attained. And if put on board their own ships, the lowest rate of freight in the market only could be charged.

A claim for the individual services of one partner can not be joined with the amount due the firm for services rendered by the partnership itself.

By the Court :

This is an action of assumpsit brought by the plaintiffs, as surviving partners of the firm of R. Coady & Co., of Honolulu, to recover the sum of \$320, and interest, which they allege to be due from the defendant in settlement of his account as a part owner in several whaling vessels, for which R. Coady & Co. were the agents or managing owners.

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By consent of parties, the case has been heard by the Court, without the intervention of a jury, judgment to be entered at the convenience of the Court, as of the October term.

This is one of four actions of the same nature, brought by the plaintiffs against the defendant and others, and as the defense made in this case is, as we understand, the same as that in the others, the decision of the present case will probably control the settlement of the others.

The plaintiffs' demand is resisted, and the accounts as sued upon are objected to, on various grounds, the fundamental point of defense being that, in the business of supplying and fitting out the whaling vessels in question, and of disposing of the products of their voyages, Richard Coady, and afterwards Coady & Co., were the agents of the present defendant and the other part owners, and therefore not entitled to any profit or remuneration for their services about the business, beyond the commission of five per cent., usually allowed in Honolulu for such agencies.

It is necessary, therefore, that we should first consider the applicability to the present case, of certain legal principles relied upon on the part of the defendant, before we take up any of the specific points touching the merits.

It is argued that a party occupying a fiduciary relation, as an agent for others in regard to any particular business, has no right, in the transaction of that business, to make any extra profits for himself, or, under any circumstances, to take for his services anything more than the stipulated commission; and that the position of an agent for the defendant, in a case like the present is incompatible with that of a merchant operating on his own account.

We have no doubt of the general soundness of these as legal propositions, or that they are of almost universal application; but upon careful consideration, we have doubts as to their being in point as to some of the questions involved in the present case. Originally, Richard Coady, and then R. Coady & Co., were part owners, together with the present defendant and others, of several whaling vessels. The present plaintiffs, and R. Coady before them, acted as ships' husbands and agents for those vessels. They were not merely ships' husbands, as

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that term is generally understood, for other men's ships, but they were the managing part owners, to whom was confided the whole management as to the fitting out and manning of the ships, as well as the disposition of the products of the whaling voyages prosecuted for the common interest. The powers and duties of a ship's husband in relation to ships engaged in ordinary trading or freighting voyages, as accurately described in the books, (see Story on agency, section 35; 1 Bell's Commentaries, 410, section 428,) full though they be, do not exactly cover the position held by the plaintiffs. From the fact that the whaling business, in which their vessels were engaged, was prosecuted from this port, to which a great part of the various materials necessary for the outfitting of the ships had first to be imported—and from which, upon the return of the vessels from the fishing grounds, almost all the products of the voyages had to be exported before they reached a market—the agency of the plaintiffs assumed a much more general character than that of mere ships' husbands. As the facts of the case appear to us, we do not think it was understood at any time that they should be regarded merely as such. True, it is in testimony, that when the business began, a chief inducement for the present defendant and others to embark their capital in it was, that Richard Coady, who was an active, shrewd business man, not at that time engaged himself as a merchant, would be able to fit out the vessels to the best advantage, by giving his personal attention to the matter, and purchasing supplies as cheaply as possible, receiving only the usual commission, so that their ships, to use the expressive language of the parties, should not have to commence their voyages "by sailing through a ship-chandler's store." The business was begun in that way, but after it had been prosecuted for some time, Mr. Coady stated to some of the parties interested that it would not pay him to carry on the fitting out of the vessels in that manner, and he commenced the ship-chandlery business himself, and also made arrangements for the importation of supplies on his own account, or that of the firm, with the view, no doubt, that he would be able to furnish such supplies for the use of the vessels, instead of continuing to purchase them here from other parties. It does not appear that any objection to this mode of proceeding was made at

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the time by the other part owners, and, accordingly, the subsequent accounts of disbursements show that a large part of the supplies for the vessels were furnished by Coady, or Coady & Co. They were in the habit of watching the market, and buying up from time to time quantities of such articles as were likely to be required in re-fitting the vessels. And such a mode of proceeding is said to be usual at those ports in the United States from whence the whaling business is extensively prosecuted.

In attempting, then, to apply to this part of the case the legal principles which are generally applicable as between principal and agent, or to ships' husbands, we must have regard to the particular circumstances of the case, and the mode of dealing between the parties. Had it been clearly understood that Coady, or Coady & Co., were merely to act as agents to purchase from others the various supplies for the ships, as the necessity for supplies arose, thus establishing between them and the other part owners the relation of principal and agent, pure and simple, then they must have been subject to the well established rules, that a person cannot act as agent in buying for another goods belonging to himself; and that no agent will be permitted to take beyond a reasonable compensation (or that agreed upon) for his services, or to hold any profits incidentally obtained in the execution of his duty, even if it be sanctioned by usage. (Story on Agency, Sections 9, 207; *Massey vs. Davies*, 2 Vesey, Jr., page 317; *Church vs. Mar. Ins. Co.*, 1 Mason, 341.)

Counsel for plaintiffs admit the soundness of these rules, and it appears by the testimony and the accounts, that in those instances where they purchased from third parties supplies required by any of the vessels, they have charged no profit to themselves beyond the stipulated commission; that when in any such instance they obtained a discount, they have allowed the advantage of that discount to accrue for the common interest; and that where they furnished articles from their own stock on hand, they have charged no more than a reasonable price, or the lowest market value of such articles at the time.

Counsel for defendant have cited several cases referred to in the notes to *Fox vs. Mackreth*, 1 Leading cases in Equity, 200,

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as sustaining the principles for which they contend, but which, upon examination, and for reasons already stated, we do not deem applicable to this part of the case. In the case of *East India Company vs. Henschman*, Lord Chancellor Thurlow held that when a factor, instead of charging factorage upon purchases made for his employers, buys up goods which he ought to furnish as factor, and deals with his constituents as a merchant, and charges mercantile profits, he may be compelled in equity to account. In the case of *Bently vs. Craven*, where one of several partners was employed to purchase goods for the firm, and he, unknown to his co-partners, purchased goods of his own at the market price, and made considerable profit thereby, it was held by Sir J. Romilly, M. R., that the transaction could not be sustained, and that he was accountable to the firm for the profit thus made. So, also, in the case of *Massey vs. Davies*, 2 Vesy, Jr., 317, an agent for a colliery, who it was stipulated was to have no emolument beyond his salary, was decreed by Sir R. Pepper Arden, M. R., to account for the profits made by selling to his principal timber belonging to himself and another person, with whom he had clandestinely entered into partnership, under the name of that person. The distinction which we draw between those cases and that branch of the present case which we are now discussing may, at first sight, seem to be a nice one, but we think it is clear. In the first place, in all those cases the relation between the parties was an unmixed, well defined relation to be governed by certain well understood principles; and, again, there is apparent in those cases conduct on the part of the defendants contrary to their duty, and to what was expected of them by the other parties, and that too in a clandestine way. Here, the outfitting of the vessels by Coady and Coady & Co., whether with supplies purchased from third parties, or with articles furnished from their own stock in trade, was carried on openly and fairly, so that if either of the other part owners had any objections to make, he had the opportunity. It does not appear that any express objection was made by the defendant, when the vessels were being fitted out, nor when the several accounts of disbursements were furnished to him, according to the usage of the business; and that fact, of itself, must now be held conclusive against him on this part of the case, as amounting in law to a waiver of all objections.

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We must now advert to the other branch of the case, which relates more particularly to the agency of Coady, and Coady & Co., about the disposition of the products of the whaling voyages. It appears that they made certain arrangements, on their own account, with Messrs. Swift & Allen, of New Bedford, in pursuance of which the plaintiffs were to forward to Swift & Allen, for sale and returns, whatever oil and bone, belonging to the catchings of the several vessels, should be sent to the United States market. The plaintiffs also negotiated for and obtained from Swift & Allen, a credit to a large amount, against which they were at liberty to draw on certain conditions. It appears that the plaintiffs availed themselves of this credit, paying interest for advances at the rate of six per cent. per annum; but they never drew on their correspondents against any particular shipment. For advances made here by the plaintiffs, on account of disbursements in the fitting out of the ships, they have charged interest against the several part-owners at the legal rate in this Kingdom, viz: twelve per cent. per annum. It is claimed, on behalf of the defendant, that the credit with Swift & Allen was obtained by the plaintiffs, through an express agreement that the products of the whaling voyages, which was the common property, should pass through Swift & Allen's hands, and that, therefore, the defendant and other part owners are entitled to share in any benefit or profit which may have accrued to the plaintiffs, by reason of that arrangement. But to this it is answered, as we think conclusively, that the facts of the case show that the arrangement for a credit with Swift & Allen, made by the plaintiffs, was made by them for the use of their business generally, solely on their own account and responsibility, and not as the agents of the other part-owners, who never authorized the plaintiffs to make any such arrangement on their behalf—never were responsible for the re-payment of any money so obtained, and cannot, therefore, claim to reap any advantage therefrom.

It is also claimed, on behalf of the defendant, that the plaintiffs have no right to charge interest on advances made by them in fitting out the vessels, without having first made a demand for contribution. But it appears in testimony, that the plaintiffs furnished the accounts of disbursements, from time to

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time, to the defendant and other part-owners, as is usual in the business, and this must be regarded as notice to them, and equivalent to an express demand, rendering them liable for interest from the time the accounts were so furnished. It is still further claimed, on behalf of the defendant, that the plaintiffs cannot charge interest on those advances, after the products of the whaling, a large portion of which was the property of the defendant and the other owners, came to the plaintiffs' hands, because they might have raised funds, by drawing bills against that property, on Swift & Allen, who had agreed to accept. But in the absence of any proof of a special agreement between the parties, on this point, and in view of the fact that the credit with Swift & Allen was obtained by the plaintiffs for their own use, and on their sole responsibility, we think it was optional with them whether to draw thus or not. It is testified by Mr. Hanks that they never did draw against any particular shipment; that on account of advices received from Swift & Allen, Coady & Co. could not have drawn against any shipment made in the fall of 1858, and that whalers' bills were that season at a discount of seven or eight per cent. The defendant and the other part-owners are credited with interest at twelve per cent. on the nett proceeds, from the date when the account of sales was made up in New Bedford, and on the whole we regard the plaintiffs' account, in respect of interest, as just and reasonable.

It is contended, further, that the defendant is entitled to the profit which may have been derived from the charter of the vessels on which his oil was transported to market, to the extent of his own freight. It appears that the plaintiffs chartered several ships, jointly with others, in San Francisco, in the summer of 1858, for freighting purposes from Honolulu. The obligation to fulfill the terms of the charter parties was assumed exclusively by them. The defendant assumed no responsibility, and had no interest in them. Whatever the loss may have been must be borne by them, and whatever the gain should be enjoyed by them, unless they have sacrificed it by some principle of law and equity for not strictly conforming to the rules which should govern agents. An agent or trustee cannot become the purchaser of the property entrusted to his

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care. This principle is well settled. I do not mean that the sale is absolutely void, but voidable, for the *cestui que trust*, and for all whom the trustee or agent acted, have an option to avoid the sale and retain the property sold, or confirm the sale and receive the consideration. (Jennison *vs.* Hopgood, 7 Pick., 1; Jennison *vs.* Hopgood, 10 Pick., 77; Church *vs.* Mar. Ins. Co., 1 Mason, 341; Barker *vs.* same, 2 Mason, 369; Exparte Kennett, 10 Vesey, 381; Shelton *vs.* Homer *et als.*, 5 Mich., 467; 5 Pick., 521.)

At the time the vessels were chartered, the whaleships were employed in the Northern seas; of their safety and their success no man could tell. At length, however, the whaleships and freighting ships arrive, and the oil and bone are to be sent forward. The plaintiffs make a contract of affreightment by the ships in whose charter they are interested, for the transportation of the defendants' oil and bone, which occupies but a small portion of the capacity of either of the ships chartered. No objection is taken by the counsel to the rate of freight, for undoubtedly they would be entitled to the lowest in the market, as they were bound to exercise their utmost diligence to secure it. To this extent unquestionably the principles of equity would apply, that, if they employed ships in which they were interested, they could only charge the lowest rate of freight; whereas, if they had exercised due diligence at the time in making their contracts of freightments, and made the most advantageous bargain they could, their principals could not vacate their contracts or make them liable, if there had been during the season a less rate of freight; but when they put the freight on their own ships, the lowest rate can only be charged. The principle to which we have hitherto adverted is very sound: that a trustee should not be a seller and purchaser at the same time, because it would subject the *cestui qui trust*, to the liability of injury—neither should an agent, unless the contract is approved by the principal. In this case, the facts show that the charter of the vessels by the plaintiffs would tend to reduce freights, as this undoubtedly did. They took the freight at the lowest rate of freight—so far, then, the defendants were benefited, and upon equitable principles they ought to acquiesce in the rate of freight charged. I do not regard the facts of this

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case as bringing it within the range of the principles before adverted to. Suppose, for example, that the plaintiffs had owned the ships, and had taken the oil on freight, would anything more be asked of them than to have the rate of freight reasonable and the lowest in the market? If the contrary principle obtains, how would the estimate be made? Should the account of the vessel be taken, and should she have paid for herself, then nothing would be due; but if she had been an incessant loss, then only the lowest rate of freight should be charged.

While seeking to extend the principle to the state of facts before us, would not great injustice arise? The defendant wanted his oil in the New Bedford market; the plaintiffs transport it in ships chartered by themselves and others—or, as may truly be said, which they owned for the time being—are they not entitled then to a fair consideration for doing it? and would it not be partaking of profits which the plaintiffs had honestly made by their business capacity, their credit and capital and labor, and at their own hazard? It appears to me that the defendant should not ask his proportion of gains, for which he has made no contribution. The defendant, or his agents, were resident in the city during the time all this business was transacted, and no objection was made, and if their freight was transported at the lowest market rate, and that a reasonable rate, I can see no reason or justice that the claim should not be allowed.

In case of a trustee, the reason is palpable that he should not purchase at his own price. It is very clear that the *cestui qui trust* should have the right to avoid the contract or confirm it; but in the case before us there is no such inequality, for the party is bound not only to a reasonable freight, but to the lowest in the market. I am not aware that any other principle has ever obtained in the commercial world, than that if agents ship by their own vessels property belonging to others, they should have pay at the lowest rate, if that was reasonable. In this case it is not denied that the rate was reasonable, and at the lowest rate in the market.

A charge occurs in one of the accounts of \$70 94, said to have been brought from the books of R. Coady, and to have been incurred as premium paid by Coady for money raised by him to make advances. There is no evidence that the defendant agreed

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to the transaction, or that he was called upon to contribute before Coady resorted to other means of raising money for advances, nor of any usage that can bind the defendant, and he is therefore not liable for premium so paid.

It appears, also, that in the account of credits given to the common adventure, there is a sum of \$500 short credited in the proceeds of certain articles or materials sold from the bark "Italy." It was explained at the trial, by the last named plaintiff, Hanks, who made out the accounts, that he had performed a great amount of extra services in relation to the bark "Italy," for which he considered himself entitled to be paid, and that instead of debiting the owners directly with the amount, he had short credited them in the proceeds of sales in the sum of \$500, for the same object. It is not argued, nor do we believe, that Mr. Hanks intended to commit a wrong by adopting this mode of getting paid. He believes himself honestly entitled to that sum, and he ought, therefore, to have claimed it from the owners openly. It appears that in conversation with one of the parties interested, who was cognizant of his extra services, that party acknowledged his right to be paid. But the claim, as it comes before us in this indirect way, is made by the surviving partners of the firm of R. Coady & Co., and not by Mr. Hanks individually. If the defendant owes anything to him as an individual, he must claim it in that capacity; it cannot be recovered in an action which is between other parties; for if the defendant had a matter of set-off pleadable against the separate demand of Mr. Hanks, he could not plead it in this action. Further, there is no charge made for those extra services in the accounts rendered to the defendant, and put in at the trial; and, therefore, if the sum were claimed as due to the firm of Coady & Co., it could not be recovered in this action. The plaintiffs are bound by the accounts as sued upon, and these show a short credit, for his share of which the defendant must have allowance, in ascertaining the amount to be recovered.

The accounts will be referred to the master, to ascertain and report the amount due to the plaintiffs, or the defendant, upon the basis of this decision, with authority to require from either of the parties any further information that may be necessary

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for that purpose ; and, upon the coming in of his report, and its approval, the Court will hear a motion for judgment.

ROBERTSON, JUSTICE.

I concur in the decision of the Court in this case, except upon one point : that is, in relation to the freighting of the defendant's oil and bone to New Bedford. Upon that point, I respectfully dissent from the opinion of my brethren, for the following reasons :

Firstly—Because the agency of Coady, and Coady & Co., and their duty in relation to that subject, were entirely distinct from their agency in fitting out the vessels, as ships's husbands.

Secondly—Because Coady, and Coady & Co., undertook this agency for a stipulated commission of five per cent.; but it appears by the evidence, that in the transaction of such agency, they made a considerable incidental profit, which the plaintiffs now seek to retain, or to recover, in addition to the stipulated commission. In my opinion, the plaintiffs are not legally entitled to retain, or to recover that incidental profit from the defendant, in the absence of express proof that he consented to deal with Coady, and Coady & Co., as principal freighters, so as to discharge them from their relations and obligations to him, as simple agents for hire. I know of no case in the books, in which it has been held that freight-brokers, factors, or other like agents, can recover for their services any profit made by them in the transaction of their agency, besides their commissions and expenses ; nor can I perceive that the cases cited by the Court have any bearing upon this point ; and I consider the doctrine adhered to in the cases of *East India Company vs. Henchman*, *Bentley vs. Craven*, and *Massey vs. Davies*, as clearly applicable to this part of the present case.

C. C. Harris, for plaintiffs.

J. W. Austin, for defendant.

Manuel Pico v. Ira Richardson.

SUPREME COURT—IN BANCO.

MANUEL PICO vs. IRA RICHARDSON.

THE defendant, claiming a right of way across the plaintiff's land, as being a highway used by the public at large from time immemorial, can not extend such right by using the path in a different or more enlarged manner than what had been the usual custom of using the same.

Justice ROBERTSON delivered the decision of the Court as follows :

This is an action of trespass *qu. cl. fr.*, brought for the alleged wrongful entry of the defendant upon a certain pasture land, held by the plaintiff under a lease from Governor Kekuanaoa, and for daily driving a herd of cattle over the same, subsequently to the 1st of April, 1860, to the damage of the plaintiff. The action was commenced as of the July term, 1860, and has been heard by the Court, without the aid of a jury, by agreement of the parties. The land leased by the plaintiff is called "Kalaepohaku," and is situated on the tapering mountain ridges between the valleys of Nuuanu and Kalihi.

The defendant admits that he has been in the habit of driving a herd of cows over the plaintiff's land, twice every day, to and from Kalihi to his own homestead in Nuuanu valley; and claims to justify his doing so on the ground of there being a public highway over the land in question.

A large amount of testimony has been laid before the Court; and we have also had the opportunity, which is often very desirable in cases of this nature, of personally viewing the locality of the controversy.

After a careful examination of the evidence before us, and due deliberation on the case, we are of the opinion that the defendant has failed to establish the existence of a public way over the plaintiff's land, in the place where the defendant has been in the habit of driving his cattle, and where the trespass has been committed.

It is in proof that in ancient times there was a public highway across Kalaepohaku, which entered the land at a point situated a considerable distance seaward, or below the end of what is now known as Judd Street (or Kalihi Street), and which

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crossed the land on the plain or flat, under the rocky ridges, from which the land probably derives its name. This was once the common public road, leading to the western portions of the island, but has long since ceased to be used as such ; although parts of it are still used as private ways of convenience and necessity by persons residing near its track, and traveling on foot or on horseback.

It is also in evidence that there are two paths crossing the plaintiff's land, on the ridges, located farther inland, or above the place where the defendant has entered with his cattle. These paths have been used more or less, as far back as the memory of living witnesses runs, by people crossing from Nuuanu valley to Kalihi, on foot or on horseback ; and there is no proof that these paths are not still used by the public in that manner, at least to a limited extent.

But this cannot avail the defense ; for, while the defendant has a right to use those paths as the public at large may use them, he cannot by any means claim the right to use either of the paths as a *drift-way* for crossing the plaintiff's land with a herd of cattle or other animals ; for there is no evidence of the existence of such a way there, nor of a public highway of such a character as can be held to include a drift-way. The plaintiff is therefore entitled to judgment, but in view of all the circumstances of the case, we think the damages should be merely nominal.

Let judgment be entered as of the last day of the July term, in favor of the plaintiff, for five dollars damages, and for the costs.

Mr. Bates for the plaintiff.

Mr. Harris for the defendant.

October, 1860.

D. M. Weston v. Daniel Montgomery.

SUPREME COURT—MOTION FOR A NEW TRIAL.

D. M. WESTON vs. DANIEL MONTGOMERY.

WHERE no fraud or corrupt misconduct is alleged on the part of the jury, the fact that the amount of the verdict was arrived at by a compromise or mutual adjustment among the jurors is not a ground for a new trial.

Likewise, mistake in a verdict, in order to warrant the granting of a new trial, should be a pure mistake, apparent upon the face of the record, and not a mistake which is to be shown by the statements of any member of the jury, or other proof extraneous to the record.

To grant a new trial on the ground of newly discovered evidence, it must appear that the evidence is material to the issue, is not cumulative, and that the party did not lose the opportunity to produce it by his own laches.

Granting a new trial rests in the sound legal discretion of the Court.

Counsel for the defendant in this cause moves the Court, upon affidavit, to grant him a new trial upon the following grounds, viz :

1st. On the ground of newly discovered evidence ;

2nd. That the verdict of the jury, as he verily believes, was arrived at by compromise, and not by fair induction from the testimony ;

3d. That the verdict is excessive, through a mistake of some of the jurors, to the amount of fifty dollars.

The argument of defendant's counsel, that this is a motion addressed to the discretion of the Court, is perfectly sound ; but that discretion should not be exercised arbitrarily, or capriciously, but according to well understood principles of practice. Although the Judge who presides at the trial of a cause may be of the opinion that the verdict of the jury has not done exact justice between the parties, that, of itself, is not a sufficient reason to sway the discretion of the Court on an application for a new trial.

The second of the grounds put forward in this case has repeatedly been urged in this Court on applications for new trial, but has always been overruled. Defendant's affidavit does not allege fraud or corrupt misconduct on the part of the jury ; but merely that the verdict appears, from its particular amount, to have been got at by a compromise, and not by any calculation

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which could be fairly based upon the evidence. In our opinion this is not sufficient. In a large majority of civil cases it is probably true that the verdict of the jury is arrived at, and rightly so, by what may be termed a compromise, or mutual adjustment and modification of ideas and views, among the jurors, with due reference to the law and the facts of the case, and the substantial rights of the parties. Were it not so, trial by jury must soon be abandoned, as an inconvenient, if not impracticable, mode of settling private controversies. (See *Dorr vs. Fenno*, 12 Pick. Rep., 520, and cases there cited.)

The third ground, viz: mistake, is equally objectionable. Mistake in the verdict, in order to warrant the granting of a new trial, should be a pure mistake, apparent upon the face of the record. A mistake which involves the idea of carelessness or inattention on the part of some of the jurors in the discharge of their duty, and which is to be shown by the statements of any member of the jury, or other proof extraneous to the record, is not the kind of mistake which can be alleged or proven in support of this motion. Upon principle, as well as upon precedent, we would regard the admission of the statements of members of the jury who tried the cause for this purpose as unwise and unsafe. (See *Howland vs. Jacobs*, vol. 2, Haw. Rep., p. 155; *Hannum vs. Belchertown*, 19 Pick. Rep., 311; 2 Greenleaf on Evidence, Section 252a, and cases there referred to.)

The only good ground suggested in support of the motion is that of newly discovered evidence. This ground alone, if made out within the recognized rules of practice, would be sufficient. But in order to that result, it should appear not only that the proposed testimony is newly discovered, that it would be material to the issue, and that it would not be merely cumulative; but that the defendant did not lose the opportunity to lay it before the jury by his own laches. For when it appears to the Court that the party might, by the exercise of due diligence, have discovered and obtained the proposed new testimony at or before the time of trial, a new trial will not be granted, unless there are in the particular case some peculiar circumstances, of such a character as are entitled to weight in the mind of the Court in deciding upon a motion addressed to its discretion.

John Evans.

In the present case the new testimony is said to be in the possession of certain persons who have already given evidence for the defendant. Both of these witnesses reside in Honolulu; the cause was not hurried to trial without sufficient time being allowed the defendant for preparation; there is no allegation of surprise; the new testimony is of a nature which the defendant, had he exercised reasonable diligence, could not have failed to discover in time, as such testimony, if in existence, would naturally be looked for in the breasts of parties who, like Hughes, Neville and Thompson, had the opportunity from their peculiar relation to the subject matter of the suit, of knowing such facts; and if the defendant failed to ascertain the extent of their knowledge on the subject, we cannot avoid the conclusion, under the circumstances, that it was his own fault. Were it not that we think the defendant's motion is clearly open to this objection, and that we feel the necessity of adhering to a line of practice which we believe to be on the whole conducive to the furtherance of justice, the apparent materiality of the proposed new testimony would be a strong inducement for granting the indulgence asked for.

The motion is refused, but without costs.

Messrs. Austin and Bates, for plaintiff.

John Montgomery, Esq., for defendant.

October 23, 1860.

SUPREME COURT—HABEAS CORPUS.

IN THE MATTER OF JOHN EVANS.

A SEAMAN to be treated as a deserter under the United States Act of 1790, must be shown to have quitted the ship without leave by an entry made in the log-book, and had been absent forty-eight hours, and by the general maritime law, to have left the ship with an *intention* to desert.

The usage that a seaman is bound to remain eight days by the vessel after she is anchored in port in safety, must be sufficiently established, and also be definite and reasonable, otherwise his leaving the ship during that period, would not be regarded as a desertion.

John Evans.

Before Justice ROBERTSON, at Chambers.

PER CURIAM:—As the case is presented before the Court, I think Evans is entitled to be discharged.

In my opinion he is not liable to be treated as a deserter, under the United States Navigation Act of 1790 ; or by reason of any stipulation in his contract as evidenced by the shipping articles ; or under the general maritime law.

In regard to the binding force of the usage or custom which is alleged to exist at this port, by which seamen shipped under the same circumstances with Evans, are obliged to remain by their ships for eight days after their return at the end of the cruise, I do not think it is necessary in this case that I should give a positive opinion. I have considerable doubt as to whether the usage is shown to have become sufficiently established, and to be so definite and reasonable, that the Court should regard it as binding.

But, admitting that such a usage does exist, and that Evans left his ship without leave, before the eight days after her arrival had expired, but after she had been anchored in safety within the harbor, he could not for that reason be arrested and imprisoned as a *deserter*. He may have made himself liable for the customary charge exacted in such cases under the usage which is set up, or to the payment of the wages given to a person employed to work in his stead, during the eight days, if any one had been employed for that purpose, which is not the case.

He cannot be treated as a deserter from his ship during the voyage, under the United States Act of 1790, because no entry of his having quitted the ship without leave was made in the ship's log-book, and when arrested he had not been absent from the ship forty-eight hours. In fact he had not been absent twenty-four hours.

In my opinion, he cannot be treated as a deserter under the general maritime law, because it is not satisfactorily proved that he left the ship with the *intention* to desert. Assuming that a binding usage or custom has been shown, he was not liable to be arrested as a deserter, under the general maritime law, simply because he went on shore without leave, unless he intended to desert, which in my opinion he did not, from the facts of the case as they appear before me.

Charles Kauffman.

The main ground upon which he is entitled, in my opinion, to be discharged, is that the ship having arrived within the harbor and been anchored in a place of safety, the cruise for which Evans shipped was ended, so far at least that he could not, for quitting the ship without leave, be arrested and imprisoned as a deserter.

C. C. Harris, Esq., for petitioner.

A. B. Bates, Esq., for master.

November 10, 1860.

SUPREME COURT—HABEAS CORPUS.

IN THE MATTER OF CHARLES KAUFFMAN.

CONSTRUCTION of the 10th Article of the American Treaty in regard to the arrest and detention of deserting seamen.

A deserter once arrested and held for his desertion from a ship, at the instance of the party who had a right to claim his services, placed fairly at the disposal of the master of the ship, and of the Consul of the United States, as the Treaty requires, cannot be re-arrested and held the second time for the same act of desertion, without a violation of his rights under the solemn stipulations made by the United States Government on behalf of their seamen.

At Chambers, before JUSTICE ROBERTSON.

It appears from the return made to the writ of habeas corpus, that Charles Kauffman was arrested on the 1st of November instant, by the Marshal of the Hawaiian Islands, in virtue of a written requisition from the Consul of the United States, representing him to be a deserter from the American whaling bark "Gratitude," whereof William Davis, Jr., is master.

The evidence shows that Kauffman did desert from the "Gratitude," at Honolulu, on the 14th November, 1859; that he was reported, together with several others, as a deserter, by Captain Davis, both at the Marshal's office and the United States Consulate; that he was arrested by the Marshal, pursuant to Captain Davis' request, on the 29th of November, several days after the "Gratitude" had gone to sea, and that he was allowed to ship at the United States Consulate on the

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same or the succeeding day, for service on board of the American whaleship "Sharon." It appears also that Captain Davis did not, before leaving the port, countermand his request to the Marshal for Kauffman's arrest, nor give any instructions, either to the United States Consul or to the Marshal, that if Kauffman was found and arrested he should be detained in custody until he could be reclaimed pursuant to the treaty; and that the Marshal did, on the 29th of November, when Kauffman came to his office in company with a shipping master, receive from Kauffman the fees and expenses of his own arrest as a deserter, and delivered to him or to the shipping master the certificate usual in such cases, addressed to the Consul of the United States, informing him that Kauffman, being a deserter from the bark "Gratitude," had paid all charges against him at the Marshal's office, and that as the Marshal had no orders to detain him in custody, he was at liberty to ship again, so far as the Hawaiian authorities were concerned.

As I understand the case, it appears to lie in a nutshell; and its decision turns upon the construction to be given to the 10th Article of the Treaty between his Majesty and the United States, and the statute (Civil Code, Sections 621 to 627) made for the purpose of carrying out the treaty stipulations on the part of the Hawaiian Government. The part of the 10th Article of the Treaty, to which I refer, reads as follows :

"The said consuls, vice consuls, and commercial agents are authorized to require the assistance of the local authorities for the search, arrest, detention and imprisonment of the deserters from the ships of war and merchant vessels of their country. For this purpose, they shall apply to the competent tribunals, judges and officers, and in writing shall demand the said deserters, proving, by the exhibition of registers of the vessels, the rolls of the crews, or by other official documents, that such individuals formed part of the crews; and this reclamation being thus substantiated, the surrender shall not be refused. Such deserters, when arrested, shall be placed at the disposal of the said consuls, vice consuls or commercial agents, and may be confined in the public prisons, at the request and cost of those who shall claim them, in order to be detained until the time when they shall be restored to the vessel to which they

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belonged, or sent back to their own country by a vessel of the same nation, or any other vessel whatsoever. The agents, owners or masters of vessels on account of whom the deserters have been apprehended, upon requisition of the local authorities, shall be required to take or send away such deserters from the states and dominions of the contracting parties, or give security for their good conduct as the law may require. But if not sent back nor reclaimed within six months from the day of their arrest, or if all the expenses of such imprisonment are not defrayed by the party causing such arrest and imprisonment, they shall be set at liberty, and shall not be again arrested for the same cause."

According to the provisions of the Treaty and the statute to which I have referred, and which taken together, seem to me to constitute the law governing this subject, there are certain things which must be done by or on behalf of the master, agent or owner, of an American ship, in cases of desertion, if he would avail himself of the rights secured to him by the Treaty. If he would reclaim the deserter, he must make an early report of the desertion, with a request, either personally or through his Consul, that the deserter may be arrested and detained at his expense, and he must reclaim the deserter within six months after his arrest. In all cases, too, where the ship shall have left the port, previous to the arrest of the deserter, the commanding officer shall, on the ship's return, be liable for the expenses of the arrest and detention of the deserter, if the Marshal shall have retained him in custody, for the purpose of his being reclaimed. It is stipulated in the Treaty by the United States, that if a seaman deserting from an American ship shall not be reclaimed for his ship, or sent back to his own country, within six months after his arrest, or if the expenses of his imprisonment are not defrayed by the party causing his arrest and imprisonment, he shall be set at liberty, and shall not be again arrested for the same cause.

Kauffman was arrested as a deserter from the "Gratitude" by the Marshal, on the report and at the instance of Captain Davis, either with or without the formality of a written requisition from the Consul, it makes no difference which, in my opinion, so far as the decision of this case is concerned. When

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Kauffman came into the custody of the Marshal, he was at the disposal of the owner, agent or master of the ship, had the latter desired to reclaim him. But the "Gratitude" had gone to sea before Kauffman was found and arrested, and no orders having been left with the Marshal for his detention in custody, he sent him on to the United States Consulate, with the usual deserter's certificate, that the Consul might, if he saw fit, and as has frequently been done in such cases, permit the man to ship and go to sea in some other American vessel; or that the Consul might, as has sometimes been done, require his detention. The Consul, having no instructions from the master or agent of the "Gratitude" to require Kauffman's detention in custody, for the purpose of his being again put on board of that ship, permitted him to deliver himself from the custody of the Marshal, and to engage for service on the "Sharon."

In my opinion, then, it is clear that Kauffman was once arrested and held for his desertion from the "Gratitude," at the instance of the party who had a right to claim his services—placed fairly at the disposal of the master of the ship, and of the Consul of the United States as the treaty requires, and cannot be arrested and held the second time for the same act of desertion, without a violation of his rights under the solemn stipulation made by the United States Government on behalf of their seamen. Six months have elapsed since the day he was arrested, without his having been reclaimed, and his desertion is purged.

Had Kauffman never been arrested at all, the case would have presented a different aspect; but Captain Davis having pursued his remedy up to the man's arrest, and subjected to his reclamation and the Consul's disposal, and having then voluntarily and with the sanction of the Consul too, allowed him to pay the expenses of his own arrest and go free, the treaty provision steps in, like a statute of limitation, and declares the further pursuit of the remedy barred forever.

Something was said during the argument in regard to the local laws, on the subject of seamen, other than that to which I have already referred; but it is obvious that those laws have no bearing on the case. When Kauffman was arrested on the 1st of November instant, he stood in the position, so far as the

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Hawaiian laws are concerned, of a seaman lawfully discharged from the ship "Sharon," and could not be legally arrested under Hawaiian laws, for having at some former period deserted from the ship "Gratitude."

In my opinion, therefore, Kauffman is entitled to be discharged from custody.

The case having been appealed to the full Court, final judgment was given on the 19th instant, as follows :

ALLEN, C. J.

This writ, which is habeas corpus, was returnable before a single Justice of this Court, and after a hearing on the return of said writ, the petitioner was ordered to be discharged, and from this decision an appeal was taken to the full Court.

The arrest was made by the Marshal of the Kingdom on the 1st of November instant, by virtue of a requisition of the Consul of the United States, representing him to be a deserter from the American whaling bark "Gratitude," whereof William Davis, Jr., is master.

It appears in evidence that the petitioner was a deserter from the "Gratitude" in November, 1859, at this port, and that he was soon after arrested by the Marshal at the request of the master of said vessel. In the meantime the "Gratitude" had sailed, and leaving no means to pay the prison expenses, the Marshal reported him to the Consul as a deserter from that vessel, that the fees had been paid to that time, and having no orders to detain him further, he was at liberty to ship, so far as the Hawaiian authorities were concerned.

It is clear by the treaty that the Consul has authority to call on the local authorities to arrest and imprison deserters, and when arrested are at his disposal, and may be confined in the public prisons at the request and cost of those who shall claim them, in order that they may be restored to their own vessel, or sent home. What is the authority of the Consul within this provision? It is full authority to cause the arrest and imprisonment, for the purpose of returning the deserters to their own vessels, or sending them home on some other. But we do not

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see that he has any authority to confine them in prison at the cost of those claiming them, unless it is by especial request. The treaty further provides that if they are not sent back, or reclaimed within six months from the day of their arrest and imprisonment, they shall be set at liberty, and shall not again be arrested for the same cause.

When the Consul demands an arrest, he is required to show the register of the vessel, the rolls of the crew, or other official documents, that such individuals formed part of the crew. In the present case, it does not appear that the Consul issued such order, but it is in proof that the master of the vessel made the request, and in pursuance thereof the arrest was made, and the petitioner held in custody, and this was authorized by the local law. So that it appears that the party causing such arrest and imprisonment was the master of the vessel; but as he furnished no means to pay the expenses of the detention, the Marshal informs the Consul that he is a deserter from the bark "Gratitude," and having paid his fees, and having no orders to detain him, from any authority, he was at liberty to ship him. The Consul was authorized to cause the deserter to be remanded to prison at the cost of the master, if he had requested him so to do, in order that he might be restored to his own vessel, or sent home. But he did not deem it proper to take this course, but certified to his shipment on the American bark "Sharon."

The master cannot complain, as the request for the arrest and imprisonment was made by him on the Marshal, and he left the Kingdom without furnishing any means to pay the expenses of the detention. The Consul was informed that he was a deserter, and arrested at the master's request, but that he had not left means to pay the cost of the detention, and, with a knowledge of these facts, he deemed it his duty to permit him to enter the service of another American ship, from which he has recently been discharged. Every facility was afforded the master to carry into effect the stipulations of the treaty, and gain its advantages, but failing to meet the expenses, the Marshal had no right, or at least was under no obligation to hold the deserter, so far as the master's request was concerned. But it is contended that the Consul should have given the order to the Marshal for the arrest, and the arrest not having been made in pur-

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suance of such order, it was inoperative, so far as giving any rights to the petitioner under treaty. It appears that the arrest was made at the request of the master of the vessel directly to the Marshal, and not by the Consul at the master's request. It hardly seems tenable that the master should repudiate his own doings, especially as he has subjected the petitioner to the same arrest and detention as he would have suffered had the request been made through the Consul. It is substantially the same restraint upon his liberty, and accomplished by the request of him who had a right to make it. The master neglected to carry out the purposes of the arrest by not furnishing the necessary means of support, and when the Consul was made cognizant of what had transpired, he does not remand the petitioner, but certifies to another contract of shipment on the bark "Sharon."

It is contended that the Consul has not authority to discharge a deserter. That is true, unless the desertion is made for cause. In this case the Consul has not discharged the deserter, but by operation of the express provision of the Treaty he is released from a second arrest by the acts of the master himself. He had caused his arrest and failed to comply with the stipulations of the Treaty, and a discharge necessarily followed. The Consul had the authority to remand the petitioner and comply with the conditions of the Treaty, but he not only does not do this, and he certainly was under no obligation to do it, but certifies to another contract of shipment. The Treaty should be carried out in its true spirit and intent, and no deserter should be arrested a second time for the same cause. If the petitioner can again be arrested, and placed on board the ship from which he had deserted, the subsequent contract on the "Sharon," certified by the Consul, was clearly illegal, and void as against the rights of the owners of the ship on which he first engaged, and it would present the seaman with the obligations of two contracts, in terms legal, and yet the last in date inoperative and void, although made with the approval of the Consul, with full knowledge. He has passed the ordeal of arrest and imprisonment, at his own expense, as the evidence shows, although he was arrested at the request of the master, and the Consul did not order the imprisonment to be continued, but certified to a

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contract on another vessel in the American service, and yet he is still sought to be again arrested, and imprisoned for the same cause. But it is said that the Consuls or Commercial Agents of the United States have no power to dissolve a contract in any case. We do not perceive the relevancy of this proposition to this case, still we will remark that we had supposed that by the laws of the United States, and the decisions in their Courts of Admiralty, that those officers could authorize the discharge of a seaman for an obstinate disobedience of orders, or on account of sickness creating disability to discharge his duty, especially if caused by his own fault, or in cases where the master has violated the stipulations of the shipping articles, also if the vessel is unseaworthy, or the seaman subjected to cruel treatment. We do not mean that Consuls have judicial powers to punish, but if a seaman is taken from a vessel in a foreign port and sent home for a crime, his contract with the vessel is at an end, and he cannot recover any wages subsequently accruing ; so if the seaman is sent home by the Consul. (Act of 1840, chap. 48, sec. 9, 14, 17 ; Statutes at large, 395 ; *Tingle vs. Tucker*, Abbot's Admiralty, 519 ; 4 Ware, 65 ; 1 Peter's Admiralty, 168, 186 ; 2 Peter's Admiralty, 268 ; 4 Mason's Rep., 541 ; *Smith vs. Treat*, Davis, 268.)

Although the contract is terminated, it does not follow that the deserter is not answerable in damages for the consequences. It is the personal liberty of the petitioner which is now in question.

It is contended by the counsel for the master, that the American Treaty was not designed to protect American seamen. If this is sound doctrine, of which the Court very much doubt, it certainly was not intended to oppress them. The history of judicial proceedings very fully illustrates the favor with which they have been regarded by the Courts of Common Law, and still more by the Admiralty. Mr. Justice Story very truly remarks, in the case of *Harder vs. Gordon*, 2 Mason's Rep., 551, "that every Court should watch with jealousy any encroachment upon the rights of seamen," and that "Courts of maritime law have been in the constant habit of extending towards them a peculiar protecting favor and guardianship ;" and there is no nation which has guarded them more carefully by the pro-

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visions of its own laws than the United States. The Court regard this article as designed to suppress desertion, and in all cases to place it within the power of the master of a vessel to reclaim a seamen if he conforms to its requirements. We regard the treaty as giving rights to masters and seamen. The seaman has his rights under this instrument, and no Courts will guard them with more care than the Admiralty Court of the country under whose flag this vessel sails.

It is further contended that the Marshal is not obliged to discharge at the end of six months, unless there was a Hawaiian statute compelling it. The treaty expressly declares that if the deserter is not sent back, nor reclaimed within six months from the day of the arrest, or if all expenses of imprisonment are not defrayed by the party causing such arrest and imprisonment, he shall be set at liberty. This is a right given to the seaman. The American Government will hardly justify this Government for detaining in prison their seamen when those whose duty it was to support them had failed to do so. They must then be set at liberty. It is a right which enures to the seaman, and every person to whom the treaty refers can call on the Courts to give it force. If there was a doubt in the construction of the treaty, and what is required by its terms, the man whose liberty would be forfeited by it, should have the benefit of it. But in this case we are clear in our views, that having been once arrested as a deserter and discharged because the stipulations of the treaty were not complied with, and again shipped by the Consul of the United States, with a full knowledge of all the facts of the desertion, arrest and imprisonment, he cannot be again arrested for the same cause. Therefore, let the petitioner be discharged.

Mr. Harris, for the petitioner.

Mr. Bates, for the master.

November 15, 1860.

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J. Montgomery *v.* Charlotte Coady.

SUPREME COURT—IN EQUITY.

J. MONTGOMERY *vs.* CHARLOTTE COADY, EXECUTRIX OF R. COADY,
DECEASED, AND GUARDIAN OF THE MINOR HEIRS.

A COURT of Equity will enforce the exercise of mutual good faith between parties, where they have respectively assumed relations towards each other, which peculiarly require it.

ALLEN, C. J.

This is a bill in equity, brought by the complainant for his proportion of the rents and profits of certain real estate situated in Kaahumanu street, Honolulu, and now occupied by J. F. Colburn and others, from October 12th, 1855, to the date of the bill.

It appears by deed, bearing date 23d October, 1850, that R. C. Janion, for the consideration of \$4,500, sold and made over to A. B. Howe that piece of ground on Kaahumanu street aforesaid, on which the large three-story store stands, and which the said Howe forthwith built thereon.

That, by deed bearing date November 25, 1851, said Howe, in consideration of \$2,750, made over to Coady, Cahoon and Lake, then copartners, one undivided half of the said *building*, retaining the *land* to himself. And it was thereby stipulated that said Howe, his representatives and assigns, should occupy the two upper stories of said building forever, without rent, and that the said Coady, Cahoon and Lake, their representatives and assigns, should occupy the ground story of said building for five years from 28th October, 1850, without rent, and that at the end of said five years, Howe, his representatives or assigns, should fix a price at which he or they would purchase the interest of Coady, Cahoon and Lake in said *building*, or sell them his interest in said *building*, and if Coady *et als.*, their representatives or assigns, should buy Howe's interest in the building, they should then purchase all Howe's interest in the land at \$4,500. Coady afterwards purchased out Cahoon and Lake's interest, and took J. C. Bullions into partnership.

By deed, bearing date Nov. 26, 1851, said Howe sold all his interest in said property to Pierce Hegarty and Henry Sea, as tenants in common, for \$6,000.

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By deed of mortgage, dated July 9th, 1853, Henry Sea mortgaged his moiety of said property to J. Montgomery for \$1,100, and in June, 1855, said Montgomery purchased all Sea's equity of redemption therein, which, with said mortgage and interest, stood him in \$3,800, for land and building.

In September, 1855, said Bullions purchased all Hegarty's moiety of Howe's interest in the land and building for \$2,450, on account of the partnership of Coady & Co., and paid for by partnership funds.

The said five years for which Coady and others were to occupy the lower story, rent free, expired on the 28th October, 1855, at which time Coady and Bullions occupied it.

To carry out the contract it was incumbent on the assignees of Howe, who were, on the 28th October, 1855, the complainant in this bill, and Coady & Co., to make an offer to Coady to sell to him their interest, which was one moiety, or buy his interest, which was the same in the buildings, at his option ; in this event, if Coady elected to buy, he was to pay \$4,500 for the land.

It appears that on the 23d October, 1855, the complainant commenced a correspondence with Bullions, of the firm of Coady & Co., upon the subject of fixing the price at which they, as assignees of Howe, should offer to sell their interest to Coady, or buy Coady's interest in conformity with the stipulation in the indenture of the 25th Nov., 1851. No reply having been received to this note of the 23d, the complainant writes again, offering to submit the question of their respective interests to the award of persons to be mutually chosen.

On the 26th October, 1855, Mr. Bullions addresses Mr. Montgomery a note, in which he says : " I have given the matter my consideration, and am willing to join you in a proposition to Mr. Coady to name the sum of \$5,000, as the consideration for which he shall buy our interest in the building, exclusive of the land, or sell to us his interest in the building."

On the same day Mr. Montgomery addresses another note in reply declining the offer of \$5,000, and offering to join him in offering \$100, as the price at which they should sell to Coady their interest in the building exclusive of the land, or purchase his interest in the building alone, and if this proposal did not

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meet with his approval, he renewed his offer of referring the same to be fixed by competent persons mutually chosen ; and that the said Bullions by letter, dated the following day, declined the foregoing propositions.

No offer was made in accordance with the terms of the indenture, and the complainant alleges the reason to be that Coady being interested in the portion of Hegarty as a partner in the house of Coady & Co., would not co-operate with the complainant, and make a reasonable proposition ; that he took every means within his power to comply with the contract, but that he was prevented by Coady & Co. from doing it. Mr. Coady was in the anomalous condition of being both buyer and seller. It is contended on the part of the respondent that the efforts of the complainant with Coady & Co. to fix upon a sum to offer Coady for his interest, or receive for their interest at his option, were of no legal effect, as they resulted in no adjustment of the respective interests of the parties in the said premises, or in a division of the same.

It is alleged and admitted that the interest of Hegarty, which was the same as the complainant, was sold at public auction for \$2,450 in September, 1855. This mode of sale is regarded as a proper mode of fixing value, and yet Coady & Co., who made this purchase, proposed to Mr. Montgomery to offer Coady \$5,000 for his moiety of the building, carrying with it the necessity of keeping the land, which at the valuation in the contract was \$4,500. The complainant regarded \$5,000 an unreasonable sum ; and, judging from the valuation as fixed at the auction sale, it was so.

It is contended that the complainant had subjected himself by the contract to the hazard of having an associate who would disagree upon an amount to offer ; this is true—but he had not subjected himself to the hazard of having some one associated with Coady, and for the purpose of forcing the complainant to terms disproportionate to the value of the premises, or to suffer injury as he has done.

I do not regard the proposition of Coady & Co. to the complainant as *bona fide*. Coady, as the partner of Coady & Co., had put himself in a position where he was bound to act in good faith and to co-operate with the complainant in fixing a reason-

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able sum, which he did not do. The complainant conducted on the highest principles of equity in carrying out the terms of the indenture, but was defeated by the want of co-operation, as the history of the transaction fully shows. Neither equity nor law will justify an advantage to be taken from such a position voluntarily assumed. I regard the exclusive rights of Coady to the lower story as terminating on the 28th day of October, 1855.

In view of all the circumstances of the case, I am of opinion that the complainant is entitled to one-fourth part of the rents and profits arising from said premises, and one-quarter part of the ground rent, the whole of which is the interest on \$4,500, the estimated value of the land. Interest to be cast on said ground rent from the time the rents were received.

It is ordered that it be referred to the Master to ascertain the whole amount of rents which have been received by the parties in interest, and report the same to the Court.

An appeal being taken to the full Court, ROBERTSON, J., delivered its decision as follows :

On the 7th of May last, the Chief Justice, sitting as Chancellor, made an interlocutory decree in this cause, declaring the complainant entitled to "one-fourth part of the rents and profits arising from said premises, and one-quarter part of the ground rent, the whole of which is the interest on \$4,500, the estimated value of the land. Interest to be cast on said ground rent from the time the rents were received," and referred the matter to the Master to ascertain the whole amount of rents which have been received by the parties in interest, and report the same to the Court.

The facts of the case, so far as is necessary to a fair understanding of the grounds of complainant's application to the Court, are set forth in the decision of the Chief Justice.

The complainant prays that the shares of the respective parties in the land and building in controversy, and in the rents and profits heretofore received thereout, may be ascertained, and that he may have a decree for his proportion thereof ; that

a partition of the property may be decreed, between himself and the respondent, and that the portion that may be allotted to him, may henceforth be held by him in severalty, or that, in lieu thereof, he and the respondent may be decreed to hold the entire land and building, and to receive the rents and profits thereof, alternately, according to their respective shares; and for the appointment of a receiver, etc., concluding with the usual general prayer for such other and further relief as the nature and circumstances of the case may require, and as the Court may deem just.

The principal facts affecting the case, as alleged in the bill, are admitted in the answer of the respondent, who also admits the necessity of having the rights and shares of the respective parties ascertained and divided; and prays that the premises may be decreed to be sold, and the proceeds apportioned to the respective parties according to their several interests; but resists the complainant's claim to any share of the rents heretofore accrued, on the ground that the assigns or representatives of A. B. Howe have never performed the covenant contained in the agreement between the said Howe, on the one part, and Coady, Cahoon and Lake, on the other part, to fix a price at which the latter could have the option of buying out the share of the former in the building, or selling out their own.

During the argument of the cause it was treated by counsel, particularly by the counsel for the respondent, as if this was a suit between A. B. Howe and Richard Coady and others, the original parties to the agreement of the 25th November, 1851; but, to my mind, it is in some respects very different. It is true that the assigns or representatives of Howe on the one hand, and of Coady, Cahoon and Lake on the other, are subject to the same equities, and can only have the same rights and remedies, the one against the other, that the original parties whom they now represent would have if the suit was between them. But a suit between the original parties never could have arisen from the same circumstances which lie at the foundation of the present suit. If, at the expiration of the five years agreed upon, Howe had been still living, and, being still possessed of the same interest in the premises that he had at the date of the agreement, he had fixed a price at which he would either sell

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his own interest in the building to Coady, Cahoon and Lake, or purchase their interest, and they had refused either to buy or sell, then Howe might have applied to this Court for assistance to compel a specific performance of the agreement by the other parties. But the present case had its origin in a state of facts entirely different from that. Before the expiration of the term of five years, Howe had assigned his interest in the premises to Hegarty and Sea, as tenants in common; Sea's interest had passed into the hands of the complainant, and that of Hegarty had been purchased at auction by John C. Bullions, the partner in business of Richard Coady; and, on the other side, Coady had become sole owner of the interest which at first had belonged to Coady, Cahoon and Lake. When the proper time arrived for that purpose, the complainant was desirous and ready to carry out the covenant contained in the agreement of the 25th November, 1851, by fixing a price at which Mr. Coady might, at his option, buy out the interest of Howe's representatives, or sell his own. But complainant was unable to do this, because Mr. Bullions, his co-tenant, the ostensible owner in common with complainant, of Howe's former interest, refused either to unite with complainant in proposing to Coady any reasonable sum as a buying or selling price, or to leave the matter to the judgment of referees; replying to complainant's application, first, by offering to fix a sum which, on the face of it, was plainly unreasonable, and finally, by declining every overture made by the complainant. The origin of this suit then was not the refusal of Coady to listen to a proposal from Howe's representatives, in pursuance of the agreement of November, 1851, for no such proposal was ever made to Coady, but the refusal by Bullions, the co-tenant of complainant, to agree with him in carrying out the contract on their side.

I have endeavored to lay bare the root of the controversy, because, I apprehend, it must be upon the peculiar feature of the case, thus presented, that Mr. Coady in his life time resisted and the respondent now resists, the claims of the complainant.

Let us see then whether or not the respondent has assumed a tenable position of defense. Her counsel argues the case as if Howe was the complainant here, and was seeking the aid of a Court of Equity to vary the terms of his contract, or to re-

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lieve him from the consequences of an improvident bargain, by which he had deprived himself of the ability to carry out the agreement of November, 1851 ; and contends that this Court cannot grant the relief which the complainant seeks to obtain. But it seems to me that this line of argument is aside from the real state of the case, and based upon erroneous premises. Howe is not the complainant in this case, nor does Montgomery, who is the complainant, ask us, as I understand it, to vary the terms of the agreement between Howe and Coady, or to relieve him against any improvident act, either of Howe, or of Howe's immediate assignee, from whom he derived title, or of himself.

The complainant's case rests upon other grounds. The agreement of November, 1851, was not made between Howe, on the one part, and Coady, Cahoon and Lake, on the other part, for themselves alone, but was made as well for the benefit of their respective heirs and assigns. On the one hand, it was incumbent upon Howe's representatives, at the expiration of the five years, to agree upon a price to be fixed as the buying or selling price, and to propose the same to Coady ; while, on the other hand, it was incumbent upon Coady to refrain from doing anything, by overt act or secret collusion, to prevent Howe's representatives from doing their duty towards each other, that he might gain an advantage ; and to exercise in good faith the option reserved to himself by the original compact.

But, says the counsel for respondent, Coady himself was the real purchaser of the other moiety of Howe's interest. Bullions was only the nominal purchaser. When the property was put up for sale, Coady had as much right to become the purchaser of it as any one else ; and if, by reason of this, the complainant got into a position of disadvantage, that was his misfortune, and Coady could not be blamed for availing himself of the advantage he thus obtained by the exercise of shrewd business tact.

Mr. Bullions was the ostensible purchaser ; the deed of conveyance was made to him ; so far as appeared outwardly, he was the real purchaser, and, when addressed by the complainant as his co-tenant, he replied in that capacity. Although, as it now appears, from the whole facts of the case as disclosed by

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the pleadings, Bullions was in fact but a nominal purchaser, the property having been paid for with partnership funds, and the amount subsequently charged to Mr. Coady, to whom also a conveyance of the legal title was finally made.

But, be that as it may, the rights of the complainant were the same, and he was not fairly dealt by. That he found himself in a position where he was unable, as one of Howe's representatives, to carry out the agreement of November, 1851, was not the result of misfortune, negligence, or any want of foresight, but was simply attributable to a want of strict good faith on the part of Mr. Bullions, who held the legal title, and had become a tenant in common of the property with the complainant. Bullions was bound to respect the rights of his co-tenant, and to co-operate with him in discharging, in good faith, the obligations that rested upon them mutually—the conditions which were annexed to their ownership of the property. If he acted otherwise, and the complainant was thereby injured, he had a right to appeal to a Court of Equity to aid him in protecting his interests, as against his co-tenant; and a Court of Equity would not have suffered any third party to obtain a benefit or unjust advantage, through collusion with Mr. Bullions, in fraud of the complainant's rights. Nothing can be clearer than the power of a Court of Equity to relieve the complainant under such circumstances as these; and to allow the respondent to resist the claims of the complainant, on the ground that he had not fulfilled a covenant which he could not fulfill without the co-operation of his co-tenant, who had refused that co-operation at the instance of the respondent himself, as the record clearly shows, would be a plain denial of justice. It is true, as has been argued, that Courts of Equity do not sit to enforce, in all cases, the principles which may be supposed to guide men of nice moral sentiments; but courts of equity do sit to enforce, in many cases, the observance of a legal or technical morality between parties who assume towards each other those relations which peculiarly demand the exercise of mutual good faith. Had Mr. Coady himself openly become the purchaser and taken the conveyance, and so have made himself tenant in common with the complainant, as to that part of the property which belonged to Howe's representatives, that cir-

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cumstance, while it might have prevented the specific performance of the contract of November, 1851, would not have precluded the complainant, in case Coady had refused to buy out his interest, from seeking the relief that he now seeks, viz: a partition of the estate, and a division of the rents and profits. In fact, the case as now presented, occupies that predicament.

That the pleadings present such a case as entitles the complainant to relief at the hands of this Court, I think there can be no doubt, and the next question is, in what form, or on what principle shall that relief be afforded? The Chief Justice, in the interlocutory decree which has been appealed from, treats the case upon the principle that the agreement of November, 1851, not having been carried out by the parties at the time specified—the right of Coady to the exclusive occupancy of the lower story of the building having terminated on the 28th day of October, 1855—and Coady having, through Bullions, become the purchaser of an undivided half of Howe's interest in the building, and an undivided half of the land, the several parties held thenceforth as tenants in common of both the building and the land; and awards the complainant a quarter part, not only of the rents received from the building since that date, but the like share in what he terms ground rent, represented by legal interest on the sum of \$4,500, the value at which Coady was bound to take the land, provided he bought out the interest of Howe, or his representatives, in the building, under the terms of the contract.

So far as that decree treats Mr. Coady as a tenant in common with the complainant, in the building and land, and requires the respondent to account for rents and profits received therefrom, I heartily concur in the same. It follows the prayer of the complainant's bill; it is consistent with the only mode of relief, perhaps, which is compatible with all the circumstances; and it makes no new contract between the parties, being simply the consequence of their own voluntary contracts. Coady's interest in the building being an undivided three-fourths, entitles the respondent to retain a corresponding share of the rents received, after allowing the complainant one-fourth part of the interest on the capital invested in the land, in the nature of ground rent, so that each may share according to his respective

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interest in the property as a whole. But, I think the decree ought to require the respondent to account for rent, at an estimated value, for the lower story of the building, during the time that Coady continued to occupy the same himself, after the 28th of October, 1855. This seems to me necessary to complete the fund which is to be distributed, and to give the complainant the full benefit of the relief contemplated by the decree.

It is contended by the respondent's counsel that the interest, or ground rent, ought not to be calculated upon \$4,500, which is much above the real value of the land, but upon the actual value, to be ascertained from year to year. It appears to me that there is weight in this objection. The decree being simply for an account and distribution of actual rents and profits, should, in order to be consistent in itself, adhere to the same principle throughout. But, if the ground rent is calculated upon an assumed value placed upon the land, and taken as conclusive against the respondent, because Mr. Coady agreed to that valuation for an entirely different purpose, then it seems to me that the relief granted by this part of the decree, is in the nature of damages in favor of the complainant, and so becomes inconsistent with the principle of relief upon which the decree is predicated.

I am of the opinion that the interlocutory decree, and order of reference, should be so modified as to include rent for the lower story of the building for the time during which the same was occupied by Richard Coady, or by Coady & Co., subsequently to the 28th of October, 1855 ; so that the ground rent, or interest, shall be calculated upon the actual relative value of the land, to be ascertained with reference to the times at which rents accrued, or were received ; and that the same stand affirmed, with these modifications.

Had the complainant filed his bill at any time antecedent to the conveyance of the legal title to Richard Coady, as against John C. Bullions, I think it would have been possible to have pursued another and perhaps more efficient mode of relief, upon the basis of a specific performance of the contract of November, 1851. But, as the case now stands, I consider the complainant

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entitled to all he asks for, and to all that is now granted, although I think he has, to some extent, slept upon his rights.

Chief Justice ALLEN : I concur in the above decision.

Mr. Harris for complainant.

Mr. Bates for respondent.

SUPREME COURT—IN ADMIRALTY.

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It is the duty of the Courts of this Kingdom, sitting as Courts of Admiralty, to exercise jurisdiction in suits between foreigners, in cases of special necessity, and in order to prevent a failure of justice.

The Court will exercise such jurisdiction in accordance with the general, well known principles which govern the Admiralty Courts of civilized nations, and under a sound judicial discretion, based upon the circumstances of each particular case.

Where the libel contained allegations of peculiar injustice and long continued injury, and the domestic forum was in a distant country where it would be impossible to procure the testimony of witnesses, to deny its consideration would be a dereliction of duty to the laws of the sea, and a virtual denial of justice, and the protest of the Consul of the United States to the exercise of the jurisdiction, in such a case, overruled.

By a plain construction of the twenty-first article of the French treaty, the jurisdiction of crimes, committed on the high seas, as well as of marine torts, "as causes of actions for damages" on the Admiralty side of the Court, remains as it was before the treaty was made.

A tort, disconnected from and having no relation to the *internal order* of the vessel is not within the purview of the stipulation of the French treaty.

In the meaning and intent of the French treaty a seaman, shipping on board of a foreign vessel, does not become, by that act of shipment, a citizen or subject of the nation to which said vessel belongs.

To give the Consul exclusive cognizance of any tort or crime, committed on board of any vessel of his country, while in the ports of this Kingdom, the contending parties must be of the same nationality as that to which the vessel belongs.

There is no such comity of nations as requires the approval or consent of the Foreign Representative to confer jurisdiction; there may be cases where such acquiescence would be indispensable and proper, and others where it is

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not necessary, from the inability of the Consul to afford redress, and where a failure of justice would ensue.

ALLEN, C. J.

Decision on the question of jurisdiction.

This is a libel for a marine trespass, or what is in the technical language of Admiralty called a cause of damage, brought by the libellant for certain wrongs and injuries, alleged by him to have been inflicted by the libellee.

The libel alleges that libellant is a native of the Western Isles; that, being at New Bedford, in America, in November, 1857, he shipped as cabin boy on board of the "Montreal," Nathaniel W. Sowle, master; that, soon after sailing, Sowle attempted to commit sodomy upon him, which he resisted; that subsequently, upon the arrival of the ship on the coast of California, he ran away from her; that, being at Lahaina, Island of Maui, the said Sowle caused him to be brought back on board the said ship, in which he sailed again on a cruise to the North, during which the said Sowle succeeded, by threats and his physical powers, in committing the crime of sodomy; that, on arriving at Honolulu from that cruise, libellant again deserted from the "Montreal," and escaped on board of the "Dromo," in which he sailed to Nangasaki, in Japan, where he was again retaken by Sowle and forcibly carried back on board the "Montreal," and went North for another cruise, during which he was again compelled by Sowle to submit to his unnatural embraces and desires.

Protesting against the jurisdiction of the Court, an answer is filed which denies the material allegations of wrong and injury to his person, and the case proceeds to trial, subsequently to which the Consul of the United States files a protest against the jurisdiction of the Court for the following reasons:

1st. Libellant and libellee are citizens of the United States, and the vessel, under command of the latter, is owned by citizens of the United States, and bears the flag of that country.

2d. That the alleged causes of action, if any there be, arose on said vessel, and while on the high seas, and beyond the jurisdiction of his Hawaiian Majesty's Courts.

3d. That it has not been usual for Courts of Admiralty, in

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cases of this kind and under these circumstances, to entertain jurisdiction without the consent of the Representative of the foreign Government to which the parties belong ; and that, in this case, no such consent has been given ; on the contrary, the said Consul has been instructed by the Diplomatic Representative of the United States, accredited near the Court of His Hawaiian Majesty, to respectfully enter a protest against this Court taking jurisdiction in the case.

4th. That by the twenty-first article of the treaty between his Hawaiian Majesty and his Imperial Majesty the Emperor of France, ratified on the 8th of September, 1858, it is provided that Consuls shall have the *exclusive* charge of the internal order on board of the merchant vessels of their nations, and the said Consuls are *alone* authorized to take cognizance of all crimes, misdemeanors, and other matters of *difference* in relation to said internal order, which may supervene between the master, the officers and crew, and the local judicial authorities are not to interfere unless by the approval or consent of the Consuls.

5th. That by the parity clause of the Treaty between the United States and this Government, the citizens of the United States are entitled to the same advantages as are given to the citizens of France by virtue of the Treaty with that Empire.

We have given the causes of the protest our most deliberate and careful consideration. This was due to the distinguished source from which it emanated, as well as to important principles which it involves, and the rights of the parties.

Parsons, an eminent American jurist, in his Work on Maritime Law, (2d vol., p. 543,) says : " It seems to be well settled, after some controversy, that an Admiralty Court has full jurisdiction over suits between foreigners, if the subject matter of the controversy is of a maritime nature. It is however a question of discretion in any case, and the Court will not take cognizance of the cause, if justice would be as well done by remitting the parties to their home forum." He further says, that " It is in cases of seamen's wages that the power of the Court is most frequently invoked, and it is well settled that cognizance of a suit will be taken when justice demands that it should be done, as when the voyage is broken up at a port of this country, or

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the seaman is compelled to desert on account of cruel treatment, or is entitled to be discharged on account of a deviation." I will advert to some of the authorities referred to by the learned author, as well as to some others. In the case of *Taylor vs. Carryl*, 20 Howard's Rep., 611, the learned Chief Justice of the Supreme Court of the United States says: "It is true, that it is not in every case obligatory upon our Courts of Admiralty to enforce it (a lien) in the case of foreign ships, and the right or duty of doing so is sometimes regulated with particular nations by treaty. But as a general rule, where there is no treaty regulation, and no law of Congress to the contrary, the Admiralty Courts have always enforced the lien where it was given by the law of the State or nation to which the vessel belonged. In this respect the Admiralty Courts act as international Courts, and enforce the lien upon principles of comity. There may be, and sometimes have been, cases in which the Court, under special circumstances, has refused to interfere between the foreign seaman and ship owner; but that is always a question of sound judicial discretion, and does not affect the jurisdiction of the Court." In *Ellison vs. ship "Bellona"*, Bee, 112, the Court say that, "Courts of Admiralty have a general jurisdiction in causes civil and maritime. The case of seamen's wages comes within the description of causes; and this jurisdiction has been uniformly exercised by me, as regards foreigners generally." In *Pugh vs. Gillau*, 1 Calif., 485, where the plaintiff was a British subject, shipped on time, and was discharged by the master some days before the time expired, because the vessel was about to sail on a long voyage, it was held that he could sue in our Courts, though the vessel and captain were English. In the case of *Davis vs. Leslie*, Abbott's Ad. Rep., 131, the Court say: "That the foreign libellant is regarded as not entitled to invoke the power of the Court as matter of absolute right; yet where the Court is satisfied that justice requires its interposition in his favor, those powers may be, and will be exercised in his behalf." The authorities, both English and American, fully sustain the doctrine of the power of the Admiralty Courts to entertain suits between foreigners, while, at the same time, its exercise is discretionary with the Court. If it is a case of special necessity to prevent a failure of justice,

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the duty is imposed to exercise the jurisdiction." (The "Courtenay," Edw. Admiralty R., 239 ; the "Wilhelm Frederick," 1 Hogg Admiralty R., 138 ; Willendson *vs.* the "Torsomet," 1 Peter's Admiralty R., 196 ; in the "Jerusalem," 2 Gall. R., 191 ; the "Aurora," 1 Wheaton, 96.) In the case of Johnson *vs.* Doltan, 1 Cowen, 543, which was an action by a seaman against a master, both foreigners, for assault and battery, committed on shipboard, the Supreme Court of the State of New York sustained the jurisdiction. They say : "Our Courts may take cognizance of torts committed on the high seas on board a foreign vessel ; but on principles of comity, as well as to prevent the frequent and serious injuries that would result, they have exercised a sound discretion in entertaining jurisdiction or not, according to circumstances."

In the case of the bark "Havanna," it appeared the ship was owned by a British subject, living in St. John's, New Brunswick, and a creditor of his, who was also a British subject and residing in the same place, instituted a suit against him in the Courts of Massachusetts, and attached the vessel, then lying in the port of Boston, and afterwards recovered judgment and took out an execution, by virtue of which the vessel was sold, and purchased by the execution creditor ; whereupon the master libelled the vessel for his wages, by virtue of the Statute of 17 and 18 Victoria, which gives a lien to a master on his ship for his wages ; and Judge Sprague, eminent and of long experience in admiralty, ruled that the District Court may, but is not bound to exercise jurisdiction in favor of a British subject against a British vessel, "and that the lien so given may be enforced in the Admiralty Courts of the United States." (22 vol. Law Reporter, 150. The learned Judge adds, that while the Court will exercise jurisdiction for the purposes of justice, it will do so the more readily if no objection is made by the Consul of the nation to which the vessel belongs. This is the rule by which this Court intends to be governed. For the purpose of justice and to prevent its failure, we deem it an imperative duty to exercise jurisdiction between foreigners, responsible and laborious though that duty may be, and it is always a matter of deep regret to the Court to feel impelled by these considerations to entertain jurisdiction, when the representative

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of the country to which the party belongs protests against it. In the ordinary cases which arise between masters and seamen of the same nation, very little difficulty is likely to arise, but when they differ in nationality, the question of comity is more difficult to decide, for the representatives of the different nations may entertain different opinions, and make adverse requests, and we must then decide the question whether or not the purposes of justice require the exercise of the jurisdiction. But the libel now under consideration contains allegations of such peculiar injustice and long-continued injury, not more destructive to the health than to the moral sense, that to deny it consideration would be, as we should regard it, a dereliction of duty to the laws of the sea, as well as to the laws of nations and of nature.

Is there a necessity in this case to exercise jurisdiction to prevent a failure of justice? It is not contended that the powers of the Consul are adequate for redress. Then the only remedy is to appeal to the home forum, or to the Courts of this country. If we decline jurisdiction, the only remedy is to follow the vessel to its destination, which is a distant country—after cruising we know not how long, or in what seas—and poor and defenseless the youth arrives at the home port of the vessel and seeks redress in the courts, with what probable success would he seek for his witnesses? Those who have been examined are from different countries and different races, and many have already been discharged from the vessel, and knowing as we do the custom and usage of shipping and discharging men in these voyages of several years duration, and of the uncertain movements of seamen, we regard it as an impossibility ever to procure the testimony at the home tribunal, at least without an amount of expense and labor that this libellant could never command, and therefore it would result in an entire failure of justice. To remit him, young and poor as he undoubtedly is, would be declaring that he must do what we think would be impossible, if not cruelly absurd. It would be a virtual denial of justice. The contingencies are too numerous to make the proposition reasonable, even if he had wealth to prosecute the suit. The defendant is master of a whaleship; when he intends to return to his country does not appear. Many of the material

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witnesses for the libellant have been discharged, and entered the service of other ships ; others may do the same before the ship reaches home. When would there be any reasonable probability that the history of the transaction could be proved ?

Parsons says : "If justice would as well be done by remitting the parties to their home forum," it is not incumbent to exercise the jurisdiction. We do not feel it our duty to exercise the jurisdiction at all times in cases even of this character ; but only in cases where from the place of the transaction in these distant seas—from the almost entire impossibility of procuring the testimony, and then not without an expense far beyond the ability of seamen, there would be an utter failure of justice, if we declined the jurisdiction. Our situation is insular, and far removed from the great marts of commerce and navigation of the Atlantic side of the United States and Europe. Many of the ships in the whaling service are absent from home usually for two or three years, and sometimes longer. Their crews are constantly changing, so that not unfrequently almost entire new crews are shipped at the different ports of the Pacific, for the season to the northern seas, with a stipulation to be discharged at the place of shipment. This is emphatically true at the ports of these islands. The seaman becomes a *quasi* domiciled alien. It would not be strange if in some of those cases the Court should feel impelled by a strong sense of judicial duty to entertain jurisdiction. It is the exercise of a discretion, governed by a legal necessity—not of caprice or will, but stern judicial duty. The seamen who visit these islands are of almost every race and nation, and should we fail to do our duty to these persons, in accordance with the principles and usages which govern Courts of Admiralty in the great maritime States, would not those States have a right by the law of nations to declare to this Government, we have recognized your independence, have received you into the family of nations, we have placed your Sovereign on an equality with the Sovereigns of other nations, and we have a right to demand of you an exercise of judicial power and jurisdiction, which shall save our citizens and subjects who may visit your Kingdom, from a failure of justice ? This is the view we entertain of our judicial duty.

It will be seen how different our situation is from that of

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ports on the Atlantic, either of Europe or America. There parties can be remitted to the home forum with comparative ease, a few days or a few weeks only will be spent in making the voyage. But from this Kingdom to any of those ports several months must pass ere the vessels reach their home ports, and in the case of whaleships sometimes years transpire.

We hope that the courts of the American and British possessions in the Pacific will afford some relief to the exercise of this jurisdiction, but at present the greater number of ships which visit us have not those possessions for their destination.

We have reasoned thus far on the general principles of Admiralty jurisdiction, without the control of treaty stipulations. The Consul of the United States in his first objection to the exercise of the jurisdiction, says that the parties are American citizens and the ship and owners American. The declaration that the libellant is an American is traversed. He swears that he was born at St. George, one of the Western Islands or Azores, under the dominion of the Kingdom of Portugal, of Portuguese parents residing on said island; that he has never been in the United States except for the space of five months, and is not a citizen of the United States. It is admitted by the counsel for the defendant that the libellant is a native of those islands, and he further states that the Consul in making this declaration only intended to say that his enlistment on an American vessel *imparted* to him *the rights* and privileges of citizenship. The Consul further declares that whatever the alleged cause of action may be, it arose on said vessel, while on the high seas and beyond the jurisdiction of his Majesty's Courts, and by the 21st Article of the Treaty with France is not cognizable in our Courts; and that whatever rights and privileges were granted by said Treaty to France were also granted to the United States, by the parity clause in their Treaty with this Kingdom.

The article in the French treaty referred to, is very clear in its terms in declaring that the laws of the Territory shall obtain in all matters touching the police of the port, the lading and discharging of vessels, the safety of merchandise, property and goods. This is merely declaratory of a principle acknowledged everywhere. But the Consul is charged with the internal order on board, and shall take cognizance of all crimes,

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misdemeanors, and other matters of difference in relation to said internal order, provided the contending parties are exclusively French or Hawaiian subjects, and the local authorities shall not interfere, unless by the approval or consent of the Consul, or in cases where the public peace is disturbed. Can any language make this article clearer than that already used? In direct and simple terms it means this, that the local laws shall govern in all matters touching the police of the port and the lading and discharging of vessels, etc.; but so far as any difficulty occurs between the captain, officers and crew, in relation to the internal order of the vessel, the Consul shall take cognizance, unless their conduct disturbs the peace of the port. If the article referred to the internal order on the high seas, could a breach of it there disturb or endanger the public peace and tranquility in any port in the Sandwich Islands? Before the date of this treaty, the jurisdiction of all crimes on the high seas belonged exclusively to the country to which the vessel belonged, and under whose flag she sailed; but when within the jurisdiction of another country, crimes or misdemeanors, although committed in enforcing discipline and order, were cognizable by the Courts of that country, and the accused could not be tried in any other jurisdiction, unless by treaty stipulation. By this treaty we yielded the jurisdiction of *our ports* to this extent, and the jurisdiction of crimes committed on the high seas as well as of marine torts "as a cause of an action for damages," remains as before.

Of the correctness of this construction we entertain not a doubt, but were it not so, it will not be seriously contended that sodomy and unnatural and offensive embraces, made by the Captain on any of his men, is for the purpose of discipline, or is designed to promote the internal order of the vessel; and were the Consul conversant with the testimony given in the case of such unnatural offenses, he would not probably take the ground that they appertained to any matters of difference in relation to the internal order of the vessel. If, then, it is a tort disconnected from and having no relation to the internal order of the vessel, it will not come within the purview of the stipulation of the French treaty, whatever construction may be given to the extent of its application in other respects.

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It is said further that all foreigners who enlist for service on American ships become American citizens. If this is so, it does not follow that they become so within the purview of this treaty. This is not the meaning and intent of the treaty. The language is that the contending parties must be exclusively French or Hawaiian subjects. So that if a French master committed a tort on a Hawaiian in attempting to enforce discipline, the jurisdiction of this Court was not surrendered, modified or curtailed, but it remains the same as before the treaty was made. But if the construction of the United States Consul obtains, Hawaiians who ship on a French vessel become subjects of France, and therefore the provisions of the treaty which contemplates that there may be French subjects and Hawaiian subjects in the service of the same vessel, is an impossibility, for on an American vessel everybody is American. If this is the construction given by American law to the act of shipment, of which we refrain from giving an opinion, this high prerogative of citizenship is not given by the laws of France or by the laws of this Kingdom, by the mere act of shipment on their vessels, and therefore the treaty must be construed according to its terms. It was not intended that if a Frenchman was killed on a Hawaiian vessel in a French port by a Hawaiian master, in enforcing discipline, that the Hawaiian should be subject alone to his Consul in that country; neither was it intended that if a Hawaiian should be killed by a Frenchman in any port of this Kingdom, the French Consul should alone take cognizance of the crime; on the contrary, this very language was undoubtedly inserted to guard the jurisdiction to this extent, so that if a Hawaiian commit a crime on a French ship, he shall have his trial within this jurisdiction, and the same rights and privilege is mutual. In the meaning and intent of the treaty the libellant is not an American, and therefore the Consul has not exclusive cognizance of the tort alleged to have been perpetrated upon him by the master, even had it arisen from a matter of difference in relation to the internal order, for, in the language of the Treaty, the contending parties must be exclusively French or Hawaiian subjects; if they are not of the same nationality the jurisdiction remains in full force.

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The remaining cause of protest is that it has not been usual for Courts of Admiralty in cases of this kind, and under these circumstances, to entertain jurisdiction without the consent of the representative of the foreign Government to which the parties belong, and more especially after a protest has been entered. Mr. Benedict, in his *Ad. Treatise*, p. 159, Sec. 282, says: "There have been attempts in England and in this country to establish an exemption (from jurisdiction) in favor of the seamen of foreign merchant ships. It has been sometimes placed on the ground of the comity of nations; sometimes on the fancied ground that a vessel is part of the territory of the nation to which she belongs; sometimes on the ground that there can be no jurisdiction in such cases without the consent of the Consul, or other diplomatic representative of the foreign nation to which the seaman or the vessel belongs—all of which are fallacious. There is no such comity of nations—nothing within the territory of a nation is without the jurisdiction, and no officer of a foreign Government can grant or destroy the jurisdiction of our Courts. Some exemptions are established by the Constitution, some by treaty, and some by the established and immemorial usage of nations, and they do not apply to persons and property engaged in the ordinary pursuits of commerce. In the present state of international intercourse and commerce, all persons in time of peace have the right to resort to the tribunal of the nation where they may happen to be, for the protection of their rights. The jurisdiction of the Courts over them is complete, except when it is excluded by treaty."

Judge Betts says, in the case of *Bocker vs. Kloskgetu*, Abbott's *Ad. Rep.*, 408, "In one respect, indeed, the American Courts show a greater favor to seamen, in these cases, than do the Courts of Great Britain, for the former proceed, irrespective of any interference on behalf of the seaman by his Consul or other national representative, whilst the English Courts would seem still to insist that the sanction of such an officer shall be procured unless the nature of the case forbids." He further says that this precautionary condition is not required in the Courts of the United States, and that jurisdiction will ordinarily be exercised if the voyage is terminated. In this case the parties belong to different countries, but the country

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of the libellant has no representative at this Court. If there was, there would doubtless be as strong a request for the Court to exercise jurisdiction as there is objection by the representative of the American Government.

Mr. Justice Grier, in *Gonzales vs. Minor*, 2 Wallace C. C., 348, says, "When the Court does entertain such cases without the request of the representative of the Government they will require the libellant to exhibit such a case of peculiar hardship, injustice, or injury, likely to be suffered without such interference, as would raise the presumption of a request, because it is in fact conferring a favor on such foreign State."

In the case of the "*Golubchuck*," 1 W. Rob., 143, the master appeared under protest, stating that the suit had been commenced without the consent of the Russian Consul, or any other accredited agent of that Government in the country, Dr. Lushington held that the Court must possess original jurisdiction over the subject matter, or it could hold none at all, for the consent of a foreign consul or minister never could confer jurisdiction upon a British court of judicature. In *Hay vs. Brig "Bloomer"*, U. S. D. C. Mass., March, 1859, Judge Sprague said, "The usual course in the case of a libel by a foreign seaman against his vessel, is to direct the clerk to inform the consul of the Government of the pendency of the suit, that he may take such notice of it as he thinks proper, and unless there were strong circumstances in the case, the Court would not proceed *in rem* against a foreign vessel, without the assent of the commercial representative here of the foreign Government of the country where she belonged."

Mr. Justice Curtiss, of the Supreme Court of the United States, overruled a protest of an English Consul to the jurisdiction of the Court, in a case where the libellant, an American citizen, had been hired in Boston for a voyage in an English registered vessel, with an English master, from Boston to St. Jago and back to a port in the United States. The voyage was performed, and the men discharged in Boston. An action was commenced in a cause of personal damage, and the English Consul filed a protest to the jurisdiction, setting forth that the vessel was a British vessel and the commander a British subject; also, "that an investigation of some of the alleged causes of

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damage must call in question official acts and conduct of a British functionary in regard to British subjects, for which he is responsible only to his Government."

It appears from all the authorities that courts will insist, in some cases, on the approval of the foreign representative before they will entertain jurisdiction, and in other cases direct notice to be given him of the pendency of the suit, unless it is apparent from the statement of the parties that he is cognizant of the suit pending, or unless the defendant acquiesces in or desires the exercise of jurisdiction. In cases where it is apparent from the allegations in the libel that the Consul has not the power to give the party redress, it has not been deemed necessary to insist on his approval or consent, or when it is manifestly necessary to prevent a failure of justice. In this case that effect would be inevitable for reasons already given. If the allegations in the libel are true, the contract of hiring is dissolved by the wrongful act of the master. Should not the party have an opportunity of seeking for redress before an Admiralty Court here, or should he be put on board the vessel at the risk of being subjected to the same inhuman wrongs and injuries many months more? Is it a usual case? Is it not more imperative in its claims for jurisdiction than any other case which can be presented, for there is the alleged wrong and injury unredressed for the past, and exposure to the same wrong and injury for the future? For illustration, it may be well to reverse the case. Suppose there was an American youth on board a Portuguese vessel, and he filed his libel making the same allegations, and the Court should say to him we can't hear your case, you must seek your remedy at the home forum, which is Portugal; therefore go aboard of your vessel, although you may be subjected to a repetition of the same disgusting life, and when you arrive in Portugal, penniless and friendless, you can prosecute your case there. The responsibility of exercising the jurisdiction rests finally upon the Court. It must be apparent that all courts would much prefer to avoid the responsibility and labor, if they could remit the parties to their home forum, when there is a reasonable probability that the case can be fully presented there, and that the accused party would not be left with the facilities to perpetrate again the same acts as those complained of.

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In this case the Court regards it an imperative judicial duty to entertain the jurisdiction, and therefore the protest of the Consul is overruled.

MANUEL ENOS (IGNACIO) vs. NATHANIEL W. SOWLE.

This cause having been submitted by agreement to the full Court in the first instance, ROBERTSON J., after the above decision on the question of jurisdiction had been given by the Chief Justice, delivered the following judgment on the merits :

The evidence introduced in support of the allegations in the libel is very lengthy, and much of it of a character which renders it inexpedient for us to recapitulate it, even briefly, in giving a decision which must be made public. But it is not necessary that we should do so, for the testimony is quite fresh in the recollection of those who heard it, and it has been referred to in detail and commented upon in the fullest manner by the learned counsel on both sides, who have argued the case with great ability. The testimony not having been given in the form of depositions, but *viva voce*, in presence of the Court, we have had the advantage of watching the demeanor and appearance of the several witnesses on the stand, and of hearing their statements as given in their own words, an advantage which is of great value in a case of this nature. The libellant's witnesses have been subjected to a searching cross-examination on the part of counsel, and several of them have been interrogated by the Court, as to points calculated to test their credibility. A small amount of testimony has been presented on behalf of the respondent, but it is very meagre and of little weight, while the respondent himself has been content with filing his written answer, denying in general terms the allegations of the libel, and has not availed himself of the opportunity freely offered him to come upon the stand and contradict or explain, if he could, the testimony of any or all of the witnesses produced against him.

After mature consideration of the evidence before us, and weighing all the facts and circumstances of the case, we are of the opinion that the theory of defense so ingeniously urged by counsel, that this is a plot or conspiracy gotten up for the pur-

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pose of ruining the respondent, is without foundation in fact ; and we are driven to the unwelcome conclusion that the allegations of the libel are clearly proved. We have no reason to doubt that the libellant, who is still a youth of tender years and fragile frame, has at various times, since he left New Bedford on board of the "Montreal," three years ago, been subjected to treatment the most foul and unnatural, at the hands of the respondent. A more glaring violation of the duty which the respondent owed to the libellant cannot be imagined. A grosser instance of oppression and persistent abuse never came to our cognizance ; and the annals of criminal jurisprudence scarce contain a case which, in the exhibition of moral depravity surpasses the present.

It becomes our duty, therefore, as a Court exercising a beneficent jurisdiction, vested in us by the Constitution of this Kingdom, and by the general maritime law of the world, to declare the contract entered into by the libellant to serve on board of the ship "Montreal," as no longer binding upon him ; and to mete out to the respondent such a measure of justice as shall secure a reasonable amount of pecuniary reparation to the libellant for the injury he has sustained, and serve to mark our reprobation of the respondent's conduct, which we now do by pronouncing in favor of the libellant for the sum of two thousand five hundred dollars damages, and the costs of suit. Let decree be entered accordingly.

Messrs. Harris and Montgomery for the libellant.

Mr. Bates for the respondent.

December 11, 1860.

SUPREME COURT—IN ADMIRALTY.

MANUEL VIEIRA vs. NATHANIEL W. SOWLE.

RESPONDENT filing no answer, the libel was taken *pro confesso*, and libellant permitted to support his libel by *ex parte* proofs.

The protest by the Consul of the United States to the jurisdiction, overruled on the same grounds that were assigned by the full Court in the recent case of Enos vs. Sowle.

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Before Justice ROBERTSON.

This is a libel in a cause of damage, filed by Manuel Vieira, a native of Pico, Western Islands, against Nathaniel W. Sowle, master of the American whaleship "Montreal," claiming damages for alleged personal injuries.

The libellant alleges, in substance, that he shipped as cabin boy on board of the "Montreal," at Honolulu, in the month of November, 1859, and sailed in said vessel to Guam, Nangasaki, the Japan Sea, and northern seas, on a whaling cruise, and returned to Honolulu last month; and that during such cruise the respondent, by force and threats, succeeded in treating the libellant in an unnatural manner, repeatedly committing upon him the act of sodomy, and compelling him to submit to other unnatural indulgences, which caused him much pain and suffering.

The Consul of the United States, at Honolulu, has filed a protest against the Court taking jurisdiction in the case, upon the same grounds that he protested against the jurisdiction in the recent case of Manuel Enos (Ignacio) *vs.* N. W. Sowle, which was a suit based upon the same cause of action. In that case the protest was overruled by the full Court, for reasons assigned at length in their decision. The protest in this case is likewise overruled, upon the grounds that the libellant did not, by having shipped for service on board of an American ship, lose his Portuguese nationality, and become a citizen of the United States within the meaning of the twenty-first article of the treaty with France; that the cause of action is not a matter relating to the *internal order*, on board of the ship "Montreal," within the purview of the aforesaid treaty; and that the libellant is no longer a seaman attached to the ship "Montreal," nor entitled to any privilege, or subject to any disability, resulting from that relation, but is here at present as a subject of the King of Portugal, temporarily resident within this Kingdom, claiming to have a right of civil action against the respondent for damages, which action can only be entertained here by the local tribunals. I have enumerated these three several grounds, although I regard the first as being of itself decisive of the question.

With all due respect to the representative of the great and friendly nation, under whose authority this protest is presented,

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I must say the assumption that the Consul of the United States has any power to object to the jurisdiction of the Court in this case, or to hear and determine this controversy himself, by virtue of any treaty stipulations to which his Hawaiian Majesty is a party, seems to me so untenable as not to admit of argument. Doubtless, many cases may arise, affecting the crews, and the internal order, on board of American ships, in which the local authorities have no right to interfere without the consent of the Consuls, but this is not one of those cases.

The defendant filed no answer in the cause, but suffered a default to be entered against him, whereupon, in conformity with Admiralty practice, the libel was ordered to be taken *pro confesso*, and the libellant was permitted to support his libel by *ex parte* proofs.

The evidence, in my opinion, is conclusive. The same unlawful and unnatural treatment, upon which the Court had occasion to animadvert in the case of Manuel Enos (Ignacio), was practiced upon Manuel Vieira, beyond a doubt. Through the beastly propensities of the respondent, the libellant has been made the victim of a course of abuse, calculated to injure and debase him physically, mentally, and morally, for which money can never make full amends. Of somewhat more mature age, and of stronger frame, however, than Manuel Enos, he has probably endured far less actual pain and suffering; nor has he, like him, been subjected to years of persecution; and the Court will accordingly award a less amount of damages in this case than was given in the former.

Let a decree be entered in favor of the libellant for the sum of fifteen hundred dollars, and the costs of suit.

Messrs. Harris and Montgomery for the libellant.

Mr. Bates for respondent.

December 14, 1860.

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SUPREME COURT—IN ADMIRALTY.

ELIAS YOUNG *vs.* WILLIAM PHILLIPS.

IN a question of jurisdiction by the Courts of this Kingdom under the 21st Article of the Treaty with France, the right of the Court to take jurisdiction at its discretion, is governed as well by the general principles of maritime law as by the provisions of the Article.

The approval of the foreign Consul does not *confer* jurisdiction, but simply *invokes*, or *assents to*, the exercise of the jurisdiction which is *inherent* in our Courts.

The jurisdiction of the Courts to take cognizance of civil controversies between foreigners is affected to some extent by the French Treaty. But to render it necessary to have the consent or approval of the Consul, that the Court may take cognizance of the case, it is not only essential that the contending parties should be exclusively of the same nationality, but they must still be attached to the vessel by the terms of the contract of shipment.

If the complaining party has been discharged or forced to leave the vessel, having a just cause of action, while attached to the vessel, said party may maintain a suit in the Courts of this Kingdom, if they are willing to entertain it, unless he has bound himself by his contract of shipment to resort to no tribunals but those of the home forum.

The Courts of this Kingdom, sitting as Courts of Admiralty in common with Admiralty Courts in the United States and Great Britain, may exercise jurisdiction in cases like the present, where the termination as well as the inception of the contract is at the ports of these islands, and where an entire failure of justice would ensue, should the complaints be dismissed.

Protest of the Consul of the United States overruled, and cause remanded for hearing.

Justice ROBERTSON delivered the decision on the question of jurisdiction, as follows :

Elias Young filed two libels in Admiralty, before one of the Justices of this Court ; the first being a libel *in personam*, against William Phillips, master of the whaleship "Arctic," in a cause of damage ; and the other, a libel *in rem* against the ship "Arctic," for wages.

Counsel for the respondent moved the Court to dismiss the libels on the ground that the Court has no jurisdiction over either case, without the approval or consent of the Consul of the United States at this port, by reason of the provisions of the 21st Article of the Treaty with France, and the 10th Arti-

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cle of the Treaty with the United States of America. The Justice overruled the motion, holding that the Court does possess, and may exercise jurisdiction in suits like the present. Whereupon an appeal was taken to the full Court.

Before the case came up for argument on the appeal, the Consul of the United States for Honolulu, filed a protest against the Court proceeding in the cause, which protest it was understood should be held applicable to the suit *in personam*, as if it should be overruled in that case, it could not prevail in the other. The substance of the protest may be comprehended in two grounds of objection, viz: Firstly, that the ship "Arctic" is an American vessel, owned by citizens of the United States; that both the parties litigant are citizens of the United States; that the alleged cause of action arose on said vessel while on the high seas; and that it is not usual for Courts of Admiralty, in cases of this kind and under similar circumstances, to entertain jurisdiction without the consent of the representative of the country to which the parties belong, which in this case is expressly refused: Secondly, that by the 21st Article of the recent Treaty with France, it is provided that Consuls shall have the *exclusive* charge of the internal order on board of the merchant vessels of their nations, and they are *alone* authorized to take cognizance of all crimes, misdemeanors, and other matters of *difference* which may supervene in relation to said internal order, and the local authorities are not to interfere therein, unless by consent of the Consul; and that by virtue of the 2d and 10th Articles of the Treaty with the United States, the jurisdiction and privileges guaranteed to the Consuls and subjects of France belongs by parity to the Consuls and citizens of the United States.

The Consul's protest means, then, in few words, that under the general maritime law, as usually administered, the Court *ought not* to exercise jurisdiction in this case, without his consent; and that in view of the 21st Article of the Treaty with France, we *cannot* exercise jurisdiction without such consent, which is refused.

In examining and deciding upon the question which is thus raised, we must take the case as presented by the allegations of the libel, no answer having been put in by the respondent, nor

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evidence given before the Court. We note this position because, while the libel may show a *prima facie* case for our jurisdiction, the evidence might subsequently show that the case is in fact one in which we ought to decline, or do not possess, jurisdiction.

The libellant alleges that in the spring of 1859 he shipped at Honolulu on board of the "Arctic," as ship's carpenter, for one whaling season to the North, and to be discharged at Honolulu at the end of the season; that, a short time after sailing from Honolulu, being at the Island of Saypan, one of the Ladrone Islands, the respondent obliged him to leave the ship and go on shore, the libellant being at the time unwell, but not in a manner dangerous to himself or others; that the respondent caused him to be placed on shore without clothes other than those at the time upon his person, although he had a sufficiency of clothes on board of the ship, which he was not allowed to take away; that he was purposely landed at a distance from the inhabited parts of the island; that he was unacquainted with the manners or language of the inhabitants; that Saypan is not a place of frequent resort for vessels, and that he was obliged to remain there for about a year, during which time he suffered great hardship.

We will first examine the proposition that the Court *cannot*, in view of treaty stipulations, entertain this suit without the consent of the Consul of the United States, because, if that position is sound, the libel must be dismissed. The twenty-first article of the treaty with France reads as follows: "In everything that concerns the police of the port, the lading and discharging of vessels, the safety of merchandise, property and goods, the subjects of the two countries shall be respectively subject to the laws and statutes of the territory. Nevertheless, the respective Consuls shall be exclusively charged with the internal order on board of the merchant vessels of their nation, and shall alone take cognizance of all the crimes, misdemeanors, and other matters of difference in relation to said internal order, which may supervene between the master, the officers, and the crew, provided the contending parties be exclusively French or Hawaiian subjects, and the local authorities shall not be allowed therein to interfere, unless by the approval

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or consent of the Consuls, or in cases where the public peace and tranquility are disturbed and endangered.

Now, the question is, to what extent has his Majesty, by assenting to the provisions of this article, *limited* the exercise of the jurisdiction possessed by his Courts of Justice at the time the treaty was ratified? We say *limited*, because this article of the treaty has not, in fact, either augmented or diminished the jurisdiction which our Courts might have rightfully exercised previous to its adoption, but has simply made the exercise of jurisdiction in certain cases, to depend upon the approval or consent of the Consul, if there is one here, or upon the occurrence of a case which disturbs and endangers the public peace. It is equally true, then, in any case where our right to take jurisdiction is affected by the provisions of this article, as it would be in any case governed by general maritime law in which the Court might take jurisdiction at its discretion, that the approval of the foreign Consul does not *confer* jurisdiction, but simply *invokes*, or *assents to*, the exercise of the jurisdiction which is *inherent* in our Courts. (The "Golubchuck," 1 W. Rob., 143.) That this is true, is proved by the provision of the treaty itself, which guarantees the right of the local authorities to interfere in cases of disturbance of the public peace, without the Consul's consent.

At the time of the ratification of the treaty with France, the jurisdiction possessed by this Court, as a Court of Admiralty, extended "to all cases of Admiralty and maritime jurisdiction," (Constitution, Article 84), and the jurisdiction of our Courts generally extended, like that of other independent States, to all persons and property, for the time being, within the territorial limits of the Kingdom, whether ashore or afloat, with the exceptions made by the law of nations. Our criminal jurisdiction to try and punish for offenses being co-extensive with our right of penal legislation, embraced the power to punish all crimes and misdemeanors committed within the Kingdom, whether on board of ships or on shore, and on board of Hawaiian vessels on the high seas. And our civil jurisdiction extended to all suits against parties whose persons or property were found here, *wheresoever* the cause of action might have arisen; the exercise of jurisdiction in civil suits purely be-

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tween foreigners being *discretionary*, and not compulsory unless made so by treaty.

How far, then, has this jurisdiction become affected by the 21st Article of the Treaty with France? The application of our territorial laws, both criminal and civil, to foreign ships and subjects, being within Hawaiian ports, and of course the right to enforce those laws by our own Courts and our own modes of trial, is still clearly preserved "in everything that concerns the police of the port, the lading and discharging of vessels, the safety of merchandise, property and goods." This, no doubt, includes quarantine laws, harbor regulations, custom house regulations, and the like, as well as penal laws for the protection of merchandise and other property. But the right of the local tribunals to enforce the territorial laws in cases of "crimes, misdemeanors and other matters of difference in relation to the *internal order* on board of the foreign ship, which may supervene between the master, the officers, and the crew, provided the contending parties be *exclusively*" subjects of the nation whose flag the ship carries, is made dependent upon the approval or consent of the Consul, or the disturbance of the public peace. The whole Article, as we understand the fair import of its language, is primarily, at least, of local application, being operative generally in regard to matters arising between the officers and crew of the foreign ship, while within the Kingdom. The criminal jurisdiction of our Courts never did, either before or since the adoption of the Treaty, extend to the trial of parties for crimes or misdemeanors committed on board of foreign ships upon the high seas, because our penal laws do not cover them, except in case of piracy. The Treaty, therefore, does not apply to those cases. But previous to the adoption of the Treaty, our criminal jurisdiction extended to the punishment of all crimes and misdemeanors committed on board of foreign merchant vessels while being in Hawaiian waters. To this branch of jurisdiction the Treaty does apply, by rendering its exercise dependent on the Consul's consent, or the existence of particular circumstances. But the language of the Treaty includes "matters of difference" between the master, officers and crew, in relation to the internal order of the ship, giving the article a more extended application. Matters

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of difference must include matters of civil controversy. Previous to the adoption of the Treaty, our Courts were in the habit of taking cognizance of civil controversies between foreigners, arriving here, whether arising *ex contractu* or *ex delicto*, at sea or on shore. The exercise of this branch of jurisdiction is unquestionably affected, to some extent, by the Treaty. We conceive that our Courts cannot now take cognizance of any civil suit arising out of a controversy supervening between the master, officers and crew of a foreign ship, in relation to the internal order, on the high seas or in our own waters, if the contending parties are exclusively of the vessel's nationality, without the consent of the Consul, if there be one here. But we conceive that in order to give the Consul cognizance of the controversy, or to render it necessary to have his consent to the Court's taking cognizance of it, both the contending parties must still be attached to the vessel. If the complaining party has been discharged from the ship, or if he has been wrongfully forced to leave her, having a just cause of action for any wrong done to him while attached to the ship, or for wages due and unpaid, he may maintain a suit for the same in our Courts, if they are willing to entertain it, unless he has bound himself by his contract of shipment to resort to no tribunals but those of the home forum.

The present case is unlike the recent cases of *Enos vs. Sowle* and *Vieira vs. Sowle*, in this respect, that there the libellants were not American citizens, but here both the libellant and respondent are American citizens, which gives a degree of weight to the protest of the Consul in the present case. But, if our view of the twenty-first article of the treaty with France is sound, the sameness of nationality in the contending parties is not of itself sufficient to sustain the protest, if either of the other concomitants prescribed by the treaty is wanting.

So far as the case is presented by the libel, it does not appear that the cause of action arose out of matters pertaining to the internal order of the ship; and it is alleged that the libellant was wrongfully compelled to quit the vessel, thereby terminating his relation to her.

It was argued by counsel for the libellant, and there is great weight in the argument, that he is here now in the attitude of

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an American citizen, not attached to any ship, claiming to have a right of civil action against the respondent, who was also here when the suit was commenced ; and that, under the provisions of the treaty between this Kingdom and the United States, the libellant has the same right to seek redress in the Courts of this country, as if he were a Hawaiian subject.

As the case appears at present, we do not think we are precluded from entertaining it, by the twenty-first article of the treaty with France ; and we will now consider whether or not we ought to entertain it without the consent of the Consul, under the circumstances of the case, and without reference to the treaty. That rests, as has been repeatedly held in this Court before, in the sound discretion of the Court. That this Court, in common with Admiralty Courts in the United States and Great Britain, may exercise jurisdiction in cases like the present, we think is clear ; and on this point we will simply refer to the numerous adjudged cases and the authorities, cited in the recent suit of *Enos vs. Sowle* (2 vol. Hawaiian R., 332), and to the judgment of the late Chief Justice Lee, in the case of *Williams vs. Lawrence et als.* (1 vol. Hawaiian R., 295), a case much in point in the present instance.

It appears that Young made his contract for service on the "Arctic" at Honolulu, for one cruise only, and to be discharged at Honolulu when the season closed. His contract with the ship had its inception here, and was to have terminated here, not in the United States, where the ship is owned. The arrival of the ship at Honolulu was to terminate the voyage, so far as he was concerned. Honolulu became to him the home port. But, unfortunately, Honolulu is not the home port of the ship ; that is on the Atlantic coast of the United States, and the time when the ship will arrive there is wholly uncertain. From the fact that a whaling voyage from thence lasts several years, during which the ships often employ fresh hands at our ports, from season to season, one voyage becomes, in fact, a series of voyages, the end of each season being, in effect to those who engaged for that season, the end of the voyage, when they are entitled to a settlement and the payment of any claims they may have against the ship or master. Such being the case, it follows

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that the Court of Admiralty here must either, in many cases, assume to exercise its jurisdiction in suits between foreigners, or turn complaining parties away, with the knowledge that their claims, however just they may be, will never be heard by a Court of justice. The Court of Admiralty here has, for the last fourteen years, frequently exercised this jurisdiction, in the interests of commerce and humanity, and, until within a few weeks past, no protest against its doing so has ever, we believe, been placed on its files by any foreign Consul resident here.

The libellant in this case is, we understand, resident here; he is so poor that the Court allowed him to institute his suit without giving security for costs upon his own *juratory* caution. If the allegations of his libel are true, he has followed the respondent from the Ladrone Islands to this Kingdom to seek redress; and now to refuse to entertain his complaint and tell him he must resume his pursuit of the ship until he finds her in New Bedford, would, to say the least, be extremely hard, and not consonant with justice or equity.

The protest is, therefore, overruled, and the cause remanded for hearing by the Justice before whom the libel was originally filed; and the libel *in rem* against the ship, will follow the same course.

Mr. Harris for the libellant.

Mr. Bates for the respondent.

December 17, 1860.

SUPREME COURT—IN ADMIRALTY.

MAKAULA et als. vs. THE BRIG "WAILUA."

IN A CASE of culpable rashness in the conduct of the master of a vessel, resulting in hardship and personal suffering to the complainants, (belonging to the crew of said vessel,) as well as a loss of time and breach of the contract of shipment, the owners of the vessel were held responsible in damages, for the acts of the master, as being within the scope of his authority, the same as if the acts had been committed by the owners themselves.

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Where, by the fault of the master, a vessel was detained in the Northern Seas, so late as to render it impossible to return to the port where the contract of shipment was made, and whereby the term of service had expired, the Court fixed a date at which the accounts under the contract should be closed, and decreed that a *quantum meruit* should be paid to the libellants for the ensuing period of service, forming a reasonable extra allowance, to be based upon the shares they were to receive during the first term of service.

Where a charge is based upon a usage, the usage must be satisfactorily proven, before it can be allowed.

Before Justice ROBERTSON :

This is a libel *in rem*, filed by Makaula and eight others, native Hawaiian seamen, against the whaling brig "Wailua," Lass master, of Honolulu. The libel sets forth, in substance, that the libellants shipped as seamen on board the "Wailua," about the 30th of December, 1858, for a whaling and trading voyage, not to exceed twelve months, and were each to receive the 140th lay or share of the proceeds derived from such whaling and trading ; that the master voluntarily and willfully, not being compelled thereto by any casualty, carried the vessel into Plover Bay, in the Fall of 1859, and made preparations to remain there during the winter, in violation of the shipping agreement ; that the vessel was frozen in in November, 1859, and remained so till the month of June, 1860, by which the libellants, who were unused to the rigors of a Northern winter, suffered great hardship, through which four of them were badly frostbitten in their feet and legs, and five of their number were severely affected with scurvy ; that during the stay of the vessel in Plover Bay, six of their companions died from the effects of privation and cold, or of complaints thereby induced ; that the amount of oil taken during the whole voyage they believe to be 650 barrels, of which they claim their share, and likewise damages for their loss of time and unnecessary suffering.

Messrs. E. Hoffschlaeger and F. Stapenhorst, part owners and agents of the vessel, appeared as claimants, and filed an answer to the libel. The answer denies that any agreement was made to pay the libellants a share of the proceeds of trading ; admits that the vessel was frozen in, and remained at Plover Bay from November, 1859, till June, 1860, but avers that Captain Lass did not remain there voluntarily or from design, but by stress of weather, the unfortunate situation and condition of his crew

disabling the vessel, and through the sudden and unexpected freezing up of the Bay, where the vessel was lying engaged in whaling; that the oil not having been gauged, the claimants are ignorant of the exact quantity procured, but believe it to be about 450 barrels for the voyage, 280 barrels for the first season, and 170 barrels the second, and state the quantity of bone to be 7,029 pounds; and that the libellants are all indebted to the vessel over and above the amount of their shares.

A large amount of evidence has been put in on both sides, and much of it is conflicting, as is usual in such cases, requiring to be carefully weighed by the light of surrounding circumstances. The main issue in the case is raised by the allegation that Captain Lass willfully and intentionally wintered his vessel in Plover Bay, which is positively denied. It appears that the "Wailua" left the Arctic Ocean and passed southward, through Behring Straits, in September, 1859, and on the 20th of that month entered Plover Bay, on the coast of Asia, for the purpose, as Captan Lass testifies, of obtaining water for the passage to these Islands. When the "Wailua" entered Plover Bay the American bark "Cleone," Captain Simmons, was already anchored there, for the purpose of whaling as long as the season would permit, and of remaining over through the winter. It was endeavored to be shown, on the part of the libellants, that Captain Lass had formed the design of remaining in Plover Bay for the winter before he entered the Bay, or if not before, that he did so soon after his arrival there, at the instigation of, and upon consultation with, Captain Simmons, of the "Cleone," and immediately commenced making arrangements for that purpose by sending on shore casks and a portion of the vessel's spars, and doing certain things which clearly indicated a design to winter in the Bay. Some testimony was given also of conversations said to have occurred between the two masters, indicating a plan to that effect, and an understanding between them that, if Captain Lass would remain through the winter, Captain Simmons would assist him with supplies. On the other hand, Captain Lass testified upon oath that he never intended to remain through the winter; that to have done so would have been a violation of his orders; that he knew he was under an obligation to return the native seamen at the

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time agreed upon, and that his vessel was not fitted with provisions and other necessities for such purpose. He states that he went to Plover Bay to obtain water, and after he arrived there, having been informed that whales frequented the Bay late in the season, he determined, with the approval of his officers, to remain as late as possible to procure oil, and obtained some supplies from Captain Simmons for that object. He states, also, that the arrangements he made, in respect to the vessel, were only such as were consistent with his intention to remain for a time whaling in the Bay, and that he sent the empty casks on shore to prevent the noise incident to their being coopered on the vessel's deck, which the Indians said would frighten the whales entering the Bay. Captain Lass' statements are strongly corroborated by the testimony of Captain Simmons, and of Mr. Williams, an officer on board of the "Wailua." As to the inferences to be drawn from the conduct of Captain Lass, after arriving in Plover Bay, in the disposition of his vessel, and his continuing to remain there after the indications of impending winter had appeared, the Court has had the aid of very valuable testimony. In no Court in the world could the testimony of men more competent to speak on the subject be produced. Captain Long, Captain Kelly and Captain Fish, who have given their evidence in this cause, are men of skill, long experience, and high reputation in their profession, giving to their statements the greatest weight on a question of this sort; albeit their testimony was given with a certain degree of *l'esprit du corps*.

After mature consideration of the evidence, I am of the opinion that it is not proven, as alleged in the libel, that Capt. Lass remained with his vessel in Plover Bay through the winter from previous design. Although such is the allegation of the libel, and the evidence does not, in my opinion, sustain it, I shall not dismiss the libel on that ground, because the defect in the libel would be cured by amending it, and inserting therein an alternative allegation charging recklessness, which would be sustained by the proofs given; an amendment which would no doubt have been allowed upon an appeal to the full Court. (Conkling's Admiralty, page 607.) The evidence does show satisfactorily that he acted imprudently and recklessly when he

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remained in Plover Bay, in the 64th degree of North latitude, so late as the 20th of November, after ice had repeatedly formed in the Bay, and with his vessel unprepared to go to sea. His conduct in this respect amounted to culpable rashness, and was the cause of the hardship, suffering, and loss of time which ensued, as well as a breach of the contract of shipment with the libellants, for the damages resulting from which the owners are liable, it having been committed by the master in the discharge of his functions as such. (Rights and Duties of Mer. Seamen, pp. 195, 199, 328, 330; Abbott on Shipping, 5th Am. Ed., pp. 156, 170; Pritchard's Ad. Digest, p. 222, Sec. 8, Note 4.) The owners are responsible for the acts and errors of judgment of the master within the scope of his authority, and in respect to the conduct of the ship, the same as if committed by the owners themselves. (The "*Vibilia*," 1 W. Rob., 15; *Ellis vs. Turner*, 8 Term. R., 531; The "*Vrouw Judith*," 1 C. Rob., 151; The "*Columbia*," 1 C. Rob., 156.)

It appears that on or about the 20th November, 1859, while three of the "*Wailua's*" boats were out engaged in whaling, a severe storm came on, breaking up the thin ice then formed in the Bay, and preventing the boats from regaining the ship. In that storm, the chief mate and one or two seamen were lost; the crews of the boats suffered intensely from cold and wet; some of them succeeded with great difficulty in reaching an Indian camp on the shore, and it was several days before all the survivors regained the vessel. It was then apparent, from the disabled condition of the crew, the unprepared state of the vessel, and the unfavorable state of the weather, that the "*Wailua*" must remain in the Bay for the winter, and dispositions were made accordingly, by housing her in, etc. The cruise for which the libellants had shipped under articles, must be held to have terminated at that time. I shall therefore decree that the accounts under the contract of shipment be closed at the 20th November, 1859; that the advances which the libellants had received, with interest thereon up to that date, shall be charged against the earnings that had accrued to them up to that time, at the 140th share of the catchings, and that the balance, if any, due to each at that date, be placed to his credit.

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It appears that the vessel remained shut up by the ice in Plover Bay until the 10th of July, 1860, at which date she was anchored outside the bay, and ready to proceed North for the second cruise. From the time the "Wailua" lost her chief officer and became shut in, till the summer of 1860, when she received supplies of fresh provisions from vessels arriving from Honolulu, was a time of severe hardship and privation for the libellants and their companions, particularly the Hawaiian seamen, several of whom sank under it. At the time of the storm in November, and through the winter, Capt. Lass, to his credit be it said, treated the libellants kindly, and did all that the limited means at his command permitted to mitigate their condition. In consideration of their detention and privations, I shall decree the libellants the sum of one hundred dollars each, and cannot allow any charge to be made against them for clothing and other necessities furnished to them between the 20th of November, 1859, and the 10th of July, 1860, at which date their accounts will be opened for the second season.

During the vessel's second cruise in the Arctic Ocean, in respect of which there was no express contract with the libellants as to wages, it appears that the "Wailua" was able to man for whaling only two boats instead of four, which was the number she could man when she sailed from Honolulu. It was contended, therefore, and with reason, that as the libellants were not under a contract for the second season, they must be paid a *quantum meruit*; the amount of which should be ascertained by an average of the catchings of the vessels which whaled in the Arctic Ocean during the season of 1860. In my opinion that would not be a fair method of ascertaining the amount to be paid the libellants, and I consider it more just towards the owners to allow the libellants, in addition to the 140th share, for which they served during the first season, and which forms a fair basis of calculation, such a reasonable extra allowance as shall, in the estimation of the Court, meet the difference which existed in the vessel's capacity for whaling between her first and second seasons. Having adopted this as the proper basis for ascertaining the amount which the libellants should receive, it does not follow, everything being considered, that a vessel which is able, efficiently and continuously, to man two boats on

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the whaling ground, will procure only half as much oil as a vessel which is able to man four boats when she leaves port, supposing their chances to be equal. I shall therefore decree the libellants to receive for their services during the second season, the 140th share of the oil and bone, with 50 per cent. added, as a *quantum meruit*.

The quantity of oil obtained during the entire voyage, according to the certified statement furnished by the claimants, is 593 barrels, which, in the absence of any positive proof as to the quantity obtained during each season separately, will be divided between the two seasons, in the proportions indicated by the answer, thus: 350 barrels for the first season, and 243 barrels for the second season. The quantity of bone procured is 7,029 pounds, which will be divided thus: 4,148 pounds for the first season, and 2,881 pounds for the second season.

There appears, printed on the margin of the shipping articles, a note to the effect that the libellants and others of the crew, were to be paid off at what are known here as "the United States Consular prices." Those are the rates for oil and bone at which seamen belonging to American ships are paid off here from season to season. It was argued by counsel for the libellants that, as the memorandum is printed only in the English language, and on the margin of the document, it was probably not understood by the libellants, and should not bind them. But the libellants having been shipped in the presence of an officer appointed by the Government, whose duty it is by law to assist the native seamen in making their contracts, and to protect them in their rights, I must presume that the officer did his duty in this instance, and explained the shipping contract to the libellants, in all its parts. Their shares will therefore be calculated at the "Consular prices," for the present season, as they have been given in evidence.

There is a charge made against each of the libellants of six days' wages after the return of the vessel to Honolulu, on the ground, as it is said, of a usage existing here, that seamen remain by their vessels for eight days after their arrival in port. The existence of such a usage is not satisfactorily proven, and the charge is therefore not allowed.

Finally, it is not proven that any agreement was made to pay

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these libellants any share of the proceeds of the trading, and they can recover none.

An order of reference will be made, authorizing J. W. Austin, Esq., to compute the amount due to the several libellants, allowing the proper credits, and upon the coming in and approval of his report, a decree will be entered accordingly.

Mr. Harris, for the libellants.

Mr. Austin and Mr. Montgomery, for the claimants.

December 8th, 1860.

SUPREME COURT—IN ADMIRALTY.

W. H. ROYS *et als.* vs. THE BRIG "WAILUA," AND CARGO.

A RECEIPT given by a seaman, in full of all demands, is open to explanation, and the degree of weight to be attached to it must depend upon the circumstances under which it is given.

Justice ROBERTSON delivered the decision.

This is a libel *in rem*, filed by W. H. Roys, William Boyer, H. Bernton and John Diaz, against the Hawaiian whaling brig "Wailua" and cargo, Lass, master. It appears by the libel that, in the month of December, 1858, W. H. Roys shipped for service on board the said brig, as second mate, at the 25th lay or share of the proceeds of the whaling and trading; William Boyer, as fourth mate and boatsteerer, at the 50th share; H. Bernton, as cooper, at the 35th share; and John Diaz, as steward, at the 90th share. The cause of action is the same as that in the case of *Makaula et als. vs. the brig "Wailua,"* decided a few days ago, and it is unnecessary, therefore, to recapitulate further the allegations of the libel.

Messrs. Hoffschlaeger & Stapenhorst appeared as claimants, and filed an answer to the libel, admitting that these libellants are entitled to a share of the proceeds of the trading as well as the whaling. They deny that Captain Lass wintered with his vessel in Plover Bay from design or previous purpose, but aver that he remained in the Bay later than vessels usually

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remain, for the purpose of getting oil, and with the assent of all the libellants except John Diaz, and that the vessel became shut in through stress of weather, and the sudden freezing up of the Bay. They aver, also, that John Diaz has been paid in full for all claims he has upon the vessel. The answer is, in other particulars, the same in substance as that in the case of *Makaula et als. vs. the brig "Wailua."*

For the sake of convenience, and by consent of counsel, the testimony taken in the former case, so far as it is applicable, was read in this cause also, and I shall not refer to it at length.

The decision of the Court in this cause is in favor of the libellants, and the extent to which, in my opinion, they are severally entitled to recover, will be stated farther on.

It appears that on the 29th of October last, some time after the return of the "Wailua" to this port, and after the libellants and most of the crew had refused to settle with the owners for their wages, taking the oil on board at the quantity estimated by the latter, the last named libellant, John Diaz, did accept from the agents the sum of \$47 50, the balance which the agents admitted to be due him for wages, and gave a receipt in full, stating that he had "no further claim against the said vessel." It was contended by counsel that this receipt should not be held binding upon Diaz, as it was proven that a greater sum was, in fact, due to him. I am aware that Courts of Admiralty generally are slow to regard a receipt in full of all demands, given by a seaman, as any bar to an action for wages, however formally such receipt may be drawn, or attested, holding it open to explanation or contradiction by oral testimony. But I think the degree of weight to be attached to such a receipt, must always depend upon the circumstances under which it is given. In this instance it appears that no undue advantage was taken of Diaz, who is an intelligent man, for he had disputed and refused to accept the settlement offered to him, and with a fair opportunity to have satisfied himself in regard to the matter, he finally accepted the amount tendered to him in full of his wages. (See *Thompson vs. Faussat, Peters' C. C. R.* 182.) Under these circumstances, I must consider his receipt conclusive as to his wages; but as it does not appear that the receipt was expressly understood by either

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party to embrace any claim that Diaz might be able to establish for his loss of time, by detention in Plover Bay, I cannot regard it as binding upon him in respect of that.

The term for which the libellants shipped must be considered to have terminated on the 29th of November, 1859, at which date the accounts between the vessel and the libellants, Roys, Boyer and Bernton, should be closed, and a balance struck, allowing interest on the advances they may have received up to that date. If any balance shall be found due to either of those libellants, it should be placed to his credit; but if anything be found due from either of them at that date, he should not be charged with it, because the advances made to them previous to that time, are applicable only to the term for which they signed articles.

None of the libellants should be charged in account with any clothing, or other necessities, furnished to them from the 20th of November, 1859, to the 10th of July, 1860, at which date the accounts of Roys, Boyer and Bernton will be opened for the second season.

I have no doubt, on the evidence, that the libellants, Boyer and Bernton, together with the chief mate, who was lost, and Mr. Williams, the third mate, in the consultation which took place between the master and officers, in accordance with what was anciently a custom of the sea, concurred with the former in running the risk of remaining in Plover Bay, so late as to endanger their being able to leave it for the winter, and which resulted in the vessel's being frozen in. Therefore I do not consider Boyer and Bernton equitably entitled to recover for the loss of time which ensued. But this will not apply to Roys, who, it appears, did not concur in that arrangement.

The libellants disputed the net value of the proceeds of trading as stated in the claimants' answer. But it was contended on behalf of the claimants, that the libellants agreed at the time of shipment, to abide by the value of the articles derived from trading, as it should be estimated by the agents of the vessel in Honolulu. The testimony adduced on this point is conflicting; but it appears that the agents were in the habit of making the agreement which they say was made in this instance, with officers shipped for service on their other vessels; and I think the

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balance of evidence is in their favor. I do not consider such an agreement, as was contended by counsel for the libellants, when made by men of their intelligence and capacity to guard their rights, as being in itself so unreasonable that the Court would be justified in disregarding it ; for I can conceive it quite consistent with probability, that the libellants should have agreed to accept the valuation of the agents, a mercantile house of high standing.

As no express contract existed with the libellants for their services during the second whaling season, and as the vessel during that season was able to man but two boats, the libellants, Roys, Boyer and Bernton, as in the case of the seamen, Makaula and others, are entitled to be paid for that season, such an amount as shall appear reasonable to the Court, as a *quantum meruit*.

The quantity of oil obtained is 593 barrels, which will be divided in the proportions indicated by the claimants' answer, thus : 350 barrels for the first season, and 243 barrels for the second season. The quantity of bone procured by whaling is 7,029 pounds, which will be divided thus : 4,148 pounds for the first season and 2,881 pounds for the second season. The net value of the proceeds of trading, as stated in the answer, is \$763 18.

The libellants agreed to be paid off at the "United States Consular rates" for oil and bone, and I shall hold those rates, as proven for the season of 1860, applicable to the settlement of the accounts of the three libellants, who have not yet received their wages, for the whole voyage. No charge can be allowed against the libellants, for not remaining by the vessel a certain number of days after her arrival in the home port, in the absence of any express contract, or usage, to support such a charge.

I consider the several libellants entitled to recover as follows, viz : W. H. Roys, one 25th share of oil and bone, as per agreement, for the first season ; for the second season, during which he acted as chief-mate, one 25th share with fifty per cent. added as a *quantum meruit*, and in consideration of his loss of time, the sum of two hundred and fifty dollars ; William Boyer, one 50th share of oil and bone, as per agreement, for the first season,

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and for the second season, one 50th share with forty per cent. added as a *quantum meruit*; H. Bernton, one 35th share of oil and bone, as per agreement, for the first season, and for the second season, one 35th share with forty per cent. added as a *quantum meruit*; John Diaz, the sum of one hundred dollars, in consideration of his loss of time. Roys, Boyer and Bernton will also receive, respectively, one 25th, one 50th, and one 35th share of the net value of the proceeds of the trading.

An order of reference will be made, authorizing J. W. Austin, Esq., to compute the amount due to each, allowing all proper deductions, and upon the coming in and approval of his report, a decree will be entered accordingly.

Mr. Harris, for the libellants.

Mr. J. W. Austin and Mr. Montgomery, for claimants.

December 12, 1860.

SUPREME COURT—IN BANCO.

JANUARY TERM, 1861.

GEORGE DAVIS *vs.* WILLIAM L. GREEN.

A BRAND, of itself, is not conclusive evidence of the ownership of an animal any more than is the fact of an animal being unbranded.

The law regulating the brands and marks of private owners, is not intended to apply to the wild herds roaming on the sides of Maunakea, which are universally recognized as the "mountain cattle of the King and Government."

These cattle cannot be regarded as animals *feræ naturæ*, and therefore do not belong to that class recognized by the law as not being the subject of property in any person until reduced to possession by the captor.

The grantee of those unbranded mountain cattle from the Government, can not be allowed to enter upon the lands of private parties for the purpose of capturing these cattle, without the consent of the owners of such lands; nor can he convert the cattle of private owners because found *unbranded* upon lands leased by him.

The owners of private lands have no right to convert the said unbranded cattle of the King and Government because found upon their lands.

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Justice ROBERTSON delivered the judgment of the Court as follows :

This is an action of trover, brought by the plaintiff to recover from the defendant the value of twenty-nine bullock hides, alleged to have been wrongfully taken and converted by certain agents of the defendant, at Waimea, Hawaii. The action was brought up to this Court at the July term, 1860, on appeal from the Police Court of Honolulu, and tried before a jury, who found a verdict for the defendant. Counsel for the plaintiff filed a bill of exceptions to certain rulings of the presiding judge, and to some parts of his charge to the jury, and thereupon moved the Court to grant a new trial. This motion came up for argument at the present term, when it was agreed by the parties that the case should be re-argued before the Court, in Banco, upon the evidence previously adduced, with the addition of such further testimony as either party might be able to produce, so that the merits of the controversy, the real magnitude of which far exceeds the pecuniary measure of the present action, should be fully investigated by the Court, according to whose final judgment on review, the verdict of the jury should either be affirmed or set aside.

The plaintiff is the proprietor of an extensive tract of land, called the Ahupuaa of Waikoloa, on the north-western slope of Maunakea, and running down to Waimea, Island of Hawaii, where he also possesses a large herd of cattle. The Ahupuaa of Waikoloa adjoins, for many miles, the lands upon which run the herds of cattle, usually known as "the wild cattle of the King and Government." The twenty-nine hides, the value of which is sued for in this action, were taken from unbranded animals, said to have been found and captured on the plaintiff's land, and were in his possession, or in that of his servants, when taken away by the defendant's agents.

The defendant sets up a title to the hides in question, as agent for, and on behalf of, Mr. Robert C. Janion, who, it is claimed, is the lessee of the lands of the King and of the Government, upon which the wild unbranded cattle run about Maunakea, and the grantee of the herds of cattle themselves, so that he stands not in the position of a mere wrong-doer. It is therefore necessary that the plaintiff should show something more,

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to enable him to recover, than his bare possession. Accordingly he claims the general, or absolute, property in the hides, upon the following grounds, viz: first, that the animals having been captured upon his land, must be presumed, although unbranded, to have been his own cattle; secondly, that the wild unbranded cattle, on and about Maunakea, are animals *feræ naturæ*,—not the property of any person, until he has taken them into possession, and may be lawfully captured by any person who finds them upon his own land; thirdly, that if the animals in question belonged to the herds called “the wild cattle of the King and Government,” plaintiff had the right, by custom, to capture them when found upon his own land, and to convert them to his own use.

As a matter of history, it is known to the Court that the first cattle placed upon these Islands were landed at Hawaii, in the years 1793 and 1794, by the British navigator Captain Vancouver, by whom they were intended as a prospective boon to the inhabitants, and to those who should visit the Islands for purposes of trade or of refreshment. King Kamehameha the First had, at that time, attained the ascendancy over the whole Island of Hawaii, and, at the suggestion of Vancouver, he proclaimed a strict taboo, or prohibition, against the killing of the cattle or their offspring, for a period of ten years. This wise precaution secured the accomplishment of the donor’s friendly intentions, for before the lapse of many years, the cattle were numbered by thousands, and in course of time the herds overran a large part of the Island.

It is in evidence before us, by the testimony of William Hughes and others, that, about the year 1826, when the late Chief Kuakini (John Adams) was Governor of Hawaii, he employed Hughes to catch and kill cattle out of the roaming herds, for the purpose of obtaining their hides and tallow, as a source of income for the Government, or rather for his late Majesty Kamehameha the Third, no Constitutional Government having been established at that time. The King subsequently engaged the late Joaquin Armas, with a small party of Californians, to prosecute the same business. Hughes estimates the number of cattle captured and killed by himself and his party at forty thousand. In the year 1841, the cattle were again placed under

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taboo, all persons being publicly prohibited from capturing or killing them.) Mr. J. P. Parker testifies that, up to that time he was the only person who had the privilege of shooting cattle on the mountain; while Mr. Haalelea, who lived with Governor Adams, mentions one or two others, who, he thinks, had a like privilege from the Governor. Dr. Judd testifies that, after the taboo of 1841, no person had the privilege of taking any of the cattle, except some foreigners who pursued the business of sawing timber in the forest, and who were permitted by the Government to take cattle for food. The charge of the cattle on the mountain, after Hughes' time, was given to Mr. William Beckley, and after him to Mr. Isaac Davis, a son of the plaintiff, who acted as agent for the King and Government. In the year 1850, the following petition was presented to the King in Council, by the late James Young Kanehoa, viz :

" HONOLULU, Oahu, April 6, 1850.

" His Majesty KAMEHAMEHA, in Privy Council :

" Sire :—Your Majesty is most probably aware, that on the arrival of Captain Vancouver at these Islands, he presented your illustrious Sire and my father some cattle, from which have propagated the numerous herds of wild cattle that now roam on the mountains of Hawaii. So long as these cattle were appropriated to your Majesty's private use, your petitioner appreciated the manner in which they were disposed of, but as they are now become a portion of public revenue, your petitioner most humbly begs that your Majesty will be graciously pleased to order, that a portion of these cattle may be given me, my brother and sisters, as the heirs of John Young, the faithful companion of your Majesty's father, and as in duty bound your petitioner will ever pray. J. Y. KANEHOA."

On the 18th of April, 1850, the following resolution was passed, in Council, touching the foregoing petition, viz :

" *Resolved*, That one thousand of the wild cattle of Hawaii be and are hereby given to the heirs of John Young, Senior, for their portion of said cattle; and that the shepherd of those cattle is hereby authorized to select and deliver to or permit said heirs to take such cattle, whenever it shall please them so to do: *Provided*, however, that said heirs shall take said cattle within two years from this date, without their increase."

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On the 10th of June, 1850, the following resolution was passed by the King in Council, viz :

"*Resolved*, That the arrangement hitherto existing between his Majesty and the Government, with regard to the cattle in Waimea, Hawaii, be hereby confirmed so far as the joint ownership of said parties is concerned, and that in future the net proceeds of all said cattle be divided equally between his Majesty and the Government, and that neither party shall sell or remove any of them without the concurrence of the other party ; said cattle furthermore to be left in charge of an agent to be chosen mutually by the King and the Minister of the Interior for the Government : *Provided always*, that it be understood the cattle running in the joint herd, but belonging to one or the other of the parties exclusively, be not affected by the resolution."

In the General Appropriation Bill of the year 1854-5, the Legislature made an appropriation of two thousand dollars, for the construction of a road from Waimea to Hilo, "to be paid out of the avails of wild cattle," to be sold for that purpose.

On the 8th day of April, 1857, the Minister of the Interior conveyed to Mr. Edward P. Adams, by an instrument in writing, "all and singular the wild cattle, to wit, bulls, oxen, cows and calves, unmarked and unbranded, now running on the Island of Hawaii, in the District of Hilo, Hamakua, and South Kohala, and on or near the mountains of Maunakea and Maunaloa," excepting so many of such cattle as had been previously sold to other parties, and then remained undelivered, "together with the privilege of pursuing, taking, driving and slaughtering the same, wherever they may be found upon lands belonging either to the King or the Government, without charge for pasturage while they pasture on the portions of the lands over which they have heretofore and now range, and with the right of entry upon the said lands, (the King's land of Pukapu excepted,) for and during the term of three years from and after the first of July next."

On the 24th of January, 1858, the Minister of the Interior issued a public notification, which appeared in the Government Gazette, calling upon all parties who had purchased wild cattle of the King and Government, previous to the 1st of January,

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1857, to take and remove their cattle before the 1st day of May, 1858, and warning all other persons against taking any of the wild cattle.

On the 16th of November, 1859, the Minister of the Interior, acting on behalf of his Majesty, and of the Government, entered into a written agreement, under seal, by which he leased to Mr. Robert C. Janion, his representatives and assigns, "all that part of those lands belonging to his Majesty and to the Government, on the mountain of Maunakea, lying above the forest, on the Hilo side of the mountain and on the Waimea side of the mountain, above the lands of Paauhau and Waiko-loa," (excepting certain lands specified in the instrument,) "with the privilege of catching and killing the wild unbranded cattle thereon, and also the privilege of catching and killing the said wild unbranded cattle on any other lands belonging to His Majesty or to the Government in the districts of Hilo, Hamakua and South Kohala (excepting his Majesty's land of Puukapu,) for and during the term of five years from and after the first day of August, A. D. 1859." The instrument, which is somewhat inartificially drawn, concludes with a covenant on the part of the Minister of the Interior, "that he is duly and fully authorized, and has good right to sell and convey the above named cattle, and all the right, title and interest, either of his Majesty the King, or of the Hawaiian Government, therein or thereto as aforesaid, and also to lease his Majesty's lands included in this agreement."

To this instrument there is appended an additional writing, which reads as follows : "Whereas, it was intended by the party of the first part to the foregoing instrument, dated November 16th, 1859, to give to the party of the second part all such right as his Majesty and the Hawaiian Government may have to catch and kill wild unbranded cattle on the island of Hawaii, for the term of five years from and after the 1st day of August, A. D. 1859 ;

"Now these presents witness that the said party of the first part in said instrument, for the considerations therein mentioned, and for the further sum of one dollar, the receipt whereof is hereby acknowledged, hath given, granted and leased, and by these presents doth give, grant and lease unto

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the said Robert C. Janion, his executors, administrators and assigns, all the right, title and interest of his Majesty Kamehameha IV., and also of the Hawaiian Government, in and to all and singular the wild and unbranded cattle, to wit, bulls, oxen, cows and calves, unmarked and unbranded, now running on the island of Hawaii, with all such right as his Majesty and the Hawaiian Government have or may have respectively, to catch, kill and convert the same, for the term of five years from the 1st day of August, A. D. 1859, as aforesaid.

"In witness whereof I have hereunto set my hand and the seal of the Department of the Interior, this 19th day of March, 1860.

"(L. S.)

L. KAMEHAMEHA."

The origin and growth of the different herds of cattle, belonging to private individuals, about Waimea and the slopes of Maunakea, have been fully described in evidence; and it appears from this evidence that there is a number of what may be termed "wild cattle," or, as some of the witnesses called them, *bush cattle*, which have located themselves in the forest belt of Hamakua. It appears that these cattle have mainly sprung from animals which have strayed from the herds of the late Mr. William French (now Mr. Janion's), Mr. Parker, and Mr. Purdy, whose cattle formerly, if not at present, ran in common, the ranges of pasture land not being divided by fences. But these bush cattle are said to be readily distinguishable from the wild mountain cattle, which differ in appearance from all other cattle upon the island of Hawaii. There is some proof also that there are unbranded cattle running on the plaintiff's land of Waikoloa, that is, animals belonging to his private herd, which have escaped being branded.

As to the first point made by the plaintiff, viz: that the animals from which the hides in question were taken, having been found upon his land, must be presumed, although not branded, to have been his own cattle; we are of the opinion that such presumption cannot be made, conclusively, in his favor, with any greater propriety than it could be conclusively presumed, on the other hand, that because these cattle were unbranded, they must therefore have been wild mountain cattle, belonging

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to Mr. Janion. The question as to whether these cattle belonged to the plaintiff's herd, or to the herds of wild cattle, was properly left to the decision of the jury, as a question of fact, upon all the circumstances of the case as given in evidence; and the jury having found for the defendant, they must have been satisfied that, according to the weight of evidence, the cattle in question were wild mountain cattle. The only ground that appears for presuming that these cattle belonged to the plaintiff, is the fact that they were found upon his land, where there are said to be some unbranded cattle of his which have escaped the drivings of his herdsmen. But the presumption that these were mountain cattle from the wild herds rests upon a broader foundation. While it is the habit of the owners of private herds to brand every animal they possess, so far as their animals can be gleaned for that purpose by stated "drivings in," from the different parts of their ranges, not one of the wild cattle of the King and the Government which run on the mountain are ever branded; for the law which regulates the brands and marks of private owners never was intended to apply to the wild herds which roam on the sides of Maunakea, and which are universally recognized as the "mountain cattle of the King and Government." It is in evidence too that numbers of these cattle are frequently seen on Waikoloa, and many of them have been captured there, from time to time, showing that they are in the habit of frequenting that land. Further, it appears that of the twenty-nine hides in question no fewer than ten or twelve were large bulls' hides, and only seventeen the hides of cows, showing a disproportion between males and females, peculiar to the wild herds, and which does not exist in any herd accustomed to be penned, or to be taken care of by herdsmen. Upon these grounds we think the inference is irresistible that the animals from which the hides were taken were mountain cattle.

But it is contended on the part of the plaintiff that the herds of wild mountain cattle are animals *feræ naturæ*, of a wild nature, which the law does not recognize as the subject of property in any person, until he has reduced them to possession, and that if the cattle from which the hides were taken belonged to these wild herds, he had a right to capture them, as wild animals, and to convert them to his own use when found upon his land.

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In our opinion these mountain cattle cannot be legally regarded as animals *feræ naturæ*. They do not belong to a species of animals which are ever classed as wild animals by nature, either by writers on law or on natural history. Nor is their state like that of animals originally *feræ naturæ*, which have for a time been brought under the immediate control and dominion of man, but have escaped and gone back to their naturally wild state. These cattle are the progeny of the tame cattle landed by Vancouver, which, in the course of time, have become more wild in their habits and appearance than the cattle which range on the lower lands, from the fact that they have been allowed to range at large, and to propagate their race free from the restraints and the management used in the care of the private herds, many of which, however, can only be reduced to manual possession by the same means that thousands of the mountain cattle have been captured, namely, with a fleet horse and a lasso. The difference between the mountain cattle and the cattle of private owners is not a difference of species or of nature, but merely a difference as to the degree of wildness in habit and appearance, superinduced by various causes, and they can no more be regarded as animals *feræ naturæ* on that account than the cattle of the plaintiff could be so regarded, if he should see fit to let them breed and range on Waikoloa for several generations without bestowing upon them the customary care and management. In that case the plaintiff's cattle, however wild they might become, would still be his property, and could not be captured and converted by neighboring proprietors as wild animals, even when found upon their own lands.

The mountain cattle have been in the constructive possession of the King and Government ever since the original stock were landed by Vancouver. The evidence is conclusive that the King and Government have continually asserted and maintained their exclusive ownership of these cattle, with the exception of that portion of them which was set apart by the King in Council, in the year 1850, as the private property of the heirs of John Young. The action of the Privy Council upon the petition of James Young Kanehoa shows clearly that at that time the Government did not regard the mountain

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cattle as animals *feræ naturæ*, at the disposal of the captor, but as having always been the subject of property, not only in the King or Government, but in private individuals, the heirs of one of the original donees. And it is in evidence, by disinterested witnesses, that, up to within a few years back, when any of the mountain cattle happened to be penned with the cattle of private owners, during a general "drive in," they were treated as the property of the Government, and held at the disposal of its agents.

By way of illustration, suppose that the heirs of John Young had caused their portion of the wild cattle to be caught and branded, and then had allowed them to run at large as before, their nature, habits and appearance unchanged, would the proprietors of private herds in the neighborhood have been permitted, upon finding these cattle on their lands, to take and convert them to their own use, on the pretence that they were animals *feræ naturæ*? We think not. And yet the title of the heirs of John Young in these cattle would not have been any better after the mere act of branding than it was before. But had the cattle been animals *feræ naturæ* before the act of branding, they would not by branding merely have become the absolute property of the heirs of John Young, so as to prevent any person who found them upon his land from killing or capturing them.

In regard to the third point raised by the plaintiff, viz : that if any of the cattle known as the "wild cattle of the King and Government" were found upon his land, he had a right, by custom, or prescription, to capture and convert them to his own use ; we are of the opinion that he is not sustained by the proofs ; but, on the contrary, we think it is clearly established by the weight of evidence that no such customary or prescriptive right exists.

But it is argued further, on the part of the plaintiff, that the deed from the Minister of the Interior to Robert C. Janion is merely a lease of certain lands of the King and Government, with the privilege of capturing and killing any of the wild unbranded cattle found thereon, and does not convey to him any right of property in those cattle as they run at large, nor until he has reduced them to actual possession ; so that he could not

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maintain an action of trover for their conversion, and can not defend against this action, not having sufficient right of property to draw after the constructive possession of the cattle. There would seem to be ground for such an argument, upon the agreement of the 16th of November, 1859, considered by itself; but as that instrument has been supplemented by the additional and explanatory writing of the 19th of March, 1860, the two documents must be taken and considered as one conveyance, and do, in our opinion, clearly amount not only to a lease of the lands therein demised, but also to a conveyance of all the right, title and interest of the King and Government, in the wild unbranded cattle on the Island of Hawaii, to Robert C. Janion and his representatives, for a specified term, upon certain conditions, so that the entire property in those cattle, (except the contingent right of reversion in such as may be left at the expiration of his term,) is in the grantee at the present time, and will remain in him until his rights are determined by the lapse of time, or breach of condition, and he may, unquestionably, maintain any action necessary to defend those rights, the same as if he had received a conveyance of the cattle forever.

Finally, it is contended by the plaintiff that the defendant, by producing the deed from the Minister of the Interior to E. P. Adams, has shown the property in the cattle to have been in Mr. Adams, and not in Mr. Janion, at the time this action was commenced, inasmuch as he has not proven that Mr. Adams' grant had at that time been determined, either by lapse of its term, or by relinquishment, or that it had been assigned to Mr. Janion. This point was made for the first time at the hearing in banco, and was therefore not passed upon by the jury. While it is true that the defendant has not expressly proven the extinguishment of Mr. Adams' rights, there is, in our opinion, evidence in the case sufficiently strong to warrant the inference by the Court, that the grant to Mr. Adams had been surrendered, or otherwise determined, before Mr. Janion obtained his grant. It is clear that Mr. Janion, through his agents, had been exercising, publicly and without dispute, all the rights of ownership over the mountain cattle on his leased lands, for a considerable time before the cause of this action occurred; while

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the plaintiff has proved nothing to support his action, beyond the bare possession of the hides, and that a possession without right.

Counsel for the plaintiff urged upon the Court the exposure to damage of the plaintiff, and others, who own private herds, if Mr. Janion's agents are permitted to enter upon their lands, for the purpose of pursuing and capturing these wild cattle; and we wish it therefore to be distinctly understood that while we hold that neither the plaintiff, nor others, have a right to take and convert those cattle, because found upon their lands, Mr. Janion or his agents have no right to enter upon those lands, for the purpose of capturing cattle under his grant from the King and Government, without the consent of the owners of the lands, nor to take and convert the cattle of private owners, because found *unbranded* upon the lands leased by him. A brand, of itself, is not conclusive evidence of the ownership of an animal, any more than is the fact of an animal being unbranded.

Our decision is that the verdict of the jury stand affirmed. Let judgment be entered accordingly, with costs.

Mr. Harris, for the plaintiff.

Mr. Montgomery and Mr. Bates, for the defendant.

March 28th, 1861.

SUPREME COURT—IN BANCO.

LOT KAMEHAMEHA vs. P. NAHAOLELUA AND J. H. KAIHEEKAI.

WHERE a *permissive use* of a right of way only has been allowed, not amounting to a dedication or prescription, the owner of the premises may revoke the license at his pleasure, and resume the possession of the *locus in quo*.

Justice ROBERTSON delivered the decision of the Court as follows:

This is an action of trespass, brought by the plaintiff, Prince L. Kamehameha, against the defendants, for a wrongful entry

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upon a certain premises, at Lahaina, the property of the plaintiff, known as the "Hoapili Premises." The present action is, in effect, a new trial of the case of L. Kamehameha vs. J. D. Kahookano *et als.*, tried at the October Term, 1858. Judgment in that case was rendered on the 7th of May, 1859, in favor of the defendants; and on the 18th of May, counsel for the plaintiff filed a motion for a new trial, on the ground that the testimony given by Mr. John Ii, to the effect that in the year 1848, a right of way had been granted to the public, over the premises in question, by Governor Kekuanaoa, who was at that time the plaintiff's guardian, was a complete surprise upon the plaintiff, and also on the ground of newly-discovered evidence. The motion was supported by the affidavits of the plaintiff, and of Governor Kekuanaoa, and came up for a hearing on the 23d of February, 1860, when it was refused by the Court, on the ground that the motion had not been filed within the time prescribed by law, nor a bond filed for costs, as required by the statute. The plaintiff then commenced the present action at the April Term, 1860, but it was not brought on for trial till the present Term, and has now been heard by the Court without the intervention of a jury. By agreement of the parties, all the testimony taken in the former suit was allowed to be read as evidence in the present case, and in addition to that, the testimony of Governor Kekuanaoa, together with some new and important testimony given by Mr. John Ii, are now before the Court.

The defendants in the former suit claimed to justify their entry on the ground that the public had a right of way over the plaintiff's premises, either by prescription or by express grant. It will be seen that in that case the Court clearly rejected the claim to a right of way, by prescription; but sustained the claim to the right of way by express grant, or dedication, chiefly upon the testimony then given by Mr. John Ii. A summary of all the evidence adduced at the trial of the former case prefaces the judgment, and it is therefore unnecessary to refer to it here.

The defendants in the present case have not set up the claim to a public way over the plaintiff's premises by prescription, such claim being clearly untenable, but rely upon the alleged express grant or dedication said to have been made by the

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plaintiff's guardian in the year 1848. Touching this point, the testimony of Mr. Ii has again been elicited, and that more fully and with much greater particularity than in the other suit; while the testimony of Governor Kekuanaoa, which is entirely new evidence, has also been added; tending to modify materially the previous aspect of this part of the case.

The statements of these two witnesses, and their recollection of certain matters that transpired at the time, in relation to the alleged dedication of a way for public use, are partially in conflict; while they are, upon some important points, reconcilable, so far as to have a combined and material bearing upon the rights of the parties. In our opinion it is clear, from the increased light that has now been thrown upon the transaction of 1848, that the plaintiff's guardian never intended, and did not authorize Mr. Ii, as his agent, to make an absolute grant or dedication of a way for the public use, over the premises in question. At the time of the alleged grant, the plaintiff was in his nineteenth year, and had, with his guardian's assent, assumed to a great extent, the management and control of his own estate; so much so that Governor Kekuanaoa testifies, positively, that he did not take, and would not at that time have taken upon himself, the responsibility to alienate any part of the plaintiff's property without his knowledge and consent. The Governor states also, that, when applied to on behalf of the church members of Lahaina, for the grant of a way, he declared that he did not consider himself empowered to make such a grant, but that the plaintiff, when he became of full age, might do as he pleased in regard to it. While Mr. Ii testifies that he believed himself authorized, under the instructions which he received from Governor Kekuanaoa, to give the church members permission to use a way to the church over the plaintiff's land, at his discretion; and that he accordingly re-opened the way which they had formerly been permitted to use by Hoapi-liwahine, but which had, previous to his visit, been obstructed by Polea, the land agent having charge of the premises; in the belief that the plaintiff, when he came of age, would approve of what was done; yet he states, distinctly, that Governor Kekuanaoa did not authorize him to grant a perpetual way to the public, or to alienate the plaintiff's land; nor did he, on his re-

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turn to Honolulu, inform the plaintiff's guardian that he had done so.

The question of *intent* on the part of the alleged grantor is of vital importance ; and upon that point the proofs do not, in our opinion, sustain the defense ; but, on the contrary, it appears to us that the re-opening of the way over the plaintiff's premises, by Mr. Ii, amounted to nothing more than a renewal of the former *permissive use*, which had been temporarily interrupted ; and being in law not a dedication, but merely a license revocable, the plaintiff may revoke the license at his pleasure, and resume the possession of the *locus in quo*.

No claim to a public way over the premises, on the ground of necessity, has been raised on the part of the defense ; nor would the evidence before us be sufficient to sustain such a claim.

Let judgment be entered, as of the last day of the term, in favor of the plaintiff, for one dollar damages and the costs.

Mr. Harris for the plaintiff.

Mr. Bates for the defendants.

February 12, 1861.

SUPREME COURT—IN ADMIRALTY.

W. E. HALIDAY vs. WILLIAM STOTT.

WHERE the defendant, as master of a packet running to California, had conveyed a debtor of the plaintiff out of the Kingdom, without a passport, as required by Sec. 651 of the Civil Code, and for justification pleaded that he had no knowledge of the indebtedness, nor of the debtor being on board : *Held*, that unless a careful diligence had been shown, such as the thorough and faithful search of the vessel, previous to passing the boundaries of the jurisdiction of the Kingdom, the master, under the provisions of the statute, would be liable for the debt.

ALLEN, C. J.

The libellant alleges, substantially, that M. M. Webster, late of Honolulu, was indebted to him in the sum of \$64, for work and labor, and fearing that he might leave the Kingdom with-

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out paying his indebtedness, he filed a written notice thereof with the Collector General of Customs, accompanied by a request that he would not grant him a passport, and that, subsequently, William Stott, master of the bark "Comet," conveyed out of the Kingdom said Webster, who had not obtained a passport to leave the Kingdom, as required by law, and said libellant now claims that said respondent has rendered himself liable to pay the debt which Webster owed him.

The respondent answers that he had no knowledge of the indebtedness of Webster to the libellant, and that he did not voluntarily or knowingly carry said Webster out of this Kingdom on board of the bark "Comet," or that he had any knowledge of said Webster's leaving the Kingdom without a passport, as required by law. He answers further that he took command of the vessel, on two or three hours' notice, by request of the master and agents, for a voyage to California and back, without any knowledge of the persons on board, either as passengers or sailors, and that he proceeded to sea about two o'clock on Saturday, the 8th of September last, and that in two hours thereafter the bark was beyond the jurisdiction of this Kingdom; and further, that he did not know that said Webster was on board till the Monday evening following, when the vessel was some four or five hundred miles from this Kingdom, and it was impracticable to return without great loss and damage. The provision of the Code under which the respondent is sought to be made liable is in these words:

"Every master or commanding officer of a vessel, who shall convey out of this Kingdom any person not having a passport, shall be subject to a fine of fifty dollars, and be liable for all debts which such person may have left unpaid in this Kingdom; and if he shall fail to pay such fine and debts, such vessel shall be subject to seizure, condemnation and sale for the payment thereof; *provided, always*, that none of the provisions of this section, or article, shall be construed as applicable to any seaman legally shipped on board of any vessel." (Sec. 651, Civil Code.)

Satisfactory evidence was adduced that Webster was indebted to Haliday as alleged, and it was admitted that written notice had been given to the Collector General by three per-

sons, alleging the indebtedness of Webster, and accompanied by a request not to grant him a passport, and that the libellant was one of those persons. It is further admitted that Webster did not obtain a passport as required by law, and that it was notorious in the community that he had attempted to get away. It was conceded on the part of the libellant, that the respondent had no knowledge of Webster being on board the vessel till the vessel was beyond our jurisdiction.

So far as the liability of the master of the vessel is concerned for the debts of the person carried out of the Kingdom, without a passport, the present law is a re-enactment of the law of 1846. Our situation affords peculiar facilities for escape, and at this early day this provision was regarded as necessary to protect our people from loss by absconding debtors. It has afforded great protection, and secured the people from much trouble and anxiety from apprehension of escapes. In our reports we find but one suit founded upon this statute, and that in the case of *Sawyer vs. Paty* (vol. 1, Hawaiian Rep., 144), in which Chief Justice Lee says that "the language of the law is clear, direct and unmistakable, and cannot be violated with impunity. The burden is upon the master of the vessel to see that his passengers have the passports required by law, and if he neglects to do so, and takes them out of the Kingdom without such passport, he voluntarily assumes the responsibility of paying their debts."

But it is said that Harris has returned and was within the jurisdiction of the Court at the commencement of this suit, and, hence, that Sawyer has sustained no loss by his departure, and ought not to hold Paty responsible. That Sawyer has sustained no loss does not appear, and it is a matter we have no right to presume. But even granting that it were so, it would not relieve Captain Paty of the liability he has incurred to pay the debt. This statute was made *pro bono publico*, and its construction admits of no doubt.

The respondent says that he left in command of the "Comet" on notice of two or three hours, and that he did not know that Webster was on board till some two days after he left the port, and that he could not return without serious injury and damage to the parties interested in the freight as well as in the vessel.

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It will hardly be seriously contended that this law may be violated with impunity by substituting a new master at the last moment of sailing. In this case the Court is aware that there was no intention of this sort, but the consequences are none the less serious to the libellant, and it is very clear that it would be very easy to make the law nugatory if this was regarded as a defense. It would have been inconvenient and a loss to have returned, but when a loss is to be incurred, who should bear it, the person who has violated the law, or the one for whose protection against injury the law was enacted?

The counsel for the respondent contends further "that as he did not take Webster out of the Kingdom voluntarily and knowingly, that he has not violated the law, and is therefore not liable." What then is the true construction of the statute? Its language is without qualification, and the ruling of the Court on its construction is clear and explicit as applicable to the case of a passenger knowingly received on board without a passport, and conveyed beyond our jurisdiction. And this is the distinction in the two cases. The law makes it imperative on all persons who have resided here thirty days to apply to the Collector for a passport when they wish to leave the Kingdom. In case of indebtedness, as in this case, the party may file his objection to a passport being granted, and if one is granted, the Collector can cancel it for cause, and if he refuses to do so, makes himself liable to a fine. It is further provided, that if any person who shall depart from any port in the Kingdom with the intention of leaving the same, without first obtaining a passport, shall be subject to a fine not exceeding \$100, in the discretion of the Court, and then follows the provision imposing the liability of the master, or commanding officer, of a vessel. The law is drawn with care, providing every precaution against escape, and with this intent so clearly given, any construction which would defeat its effectiveness would certainly be as much against its spirit as it is clearly against its letter. It will be seen that the law is very rigid on the subject of passports, and, being so, the liability of the master of a vessel, who should disregard their necessity for passengers, would seem to be inevitable, or the law would be wholly inefficient, and the care used to prevent passports being given idle.

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While Courts will not question or control the authority of a statute, if clear and explicit in its terms, and in accordance with the Constitution of the Kingdom, it is still their duty to give them a reasonable construction. They will not regard it within the contemplation of a law, that consequences of injustice or absurdity should follow from the terms of any law. The intention of the Legislature in the statute, upon which the libellant relies, is very clear; it was designed to protect our people here from injury by absconding debtors, our situation being insular, and the facilities being so great for escape, some provision was deemed necessary to prevent loss. Literally the law admits of but one construction. If a master of a vessel conveys a man out of the Kingdom, he is liable for his debts.

On the part of the respondent it is contended, that if being a penal statute, it must be proved that he knew that the man was on board of his vessel when he left the Kingdom. This is not in accordance even with the fully recognized doctrine of a criminal negligence in cases of omission. In the case of *Regina vs. Lawe*, 4 Cox, C. C., Lord Campbell, Chief Justice, says: "I am clearly of opinion that an act of omission as well as of commission may be so criminal as to be the subject of an indictment of manslaughter." In this case, the law prohibited the respondent from carrying Webster out of the Kingdom without a passport. He admits that he has done it, and for justification says that he was not aware that he was on board. Every person is bound by law to do his whole duty. Has the respondent performed all those acts which the law requires? Has he done so in the present case? Had he made a thorough and faithful search of the vessel previous to passing the boundaries of our jurisdiction, or taken any other course which had evinced a careful and thorough diligence in guarding against persons making their escape, I should have regarded it as a compliance with the law. I regard this as a more liberal construction of the statute than that of the Court in the case of *Sawyer vs. Paty*.

If the position taken by the Counsel for the respondent is sound, it would completely defeat all laws for acts of omission. When the law prohibits any act on board from being done, the most literal construction which can be given in its interpreta-

tion is that the utmost diligence and care was taken to prevent it. This law, which the Legislature took so much pains to guard, would be, with this construction, utterly ineffective. It would not require much precaution or self-denial, on the part of the person desirous of escaping, to conceal himself till the vessel had passed out of the jurisdiction, and the master need never be compromised. This is not the letter of the law, which is stringent, nor is it the spirit, for that seeks to protect our people against loss by absconding debtors, by the utmost vigilance. It is as sound in law as it is in ethics, not to leave undone those things which ought to be done, as to do those things which ought not to have been done. Negligence is often as fatal in its results as a positive act of commission.

I regard the law as clear and explicit in the one case as the other—both civilly and criminally; that the former more frequently escape, is inevitable from the nature of the evidence applicable to the case. It is unnecessary to discuss the different degrees of negligence requisite to create a liability in criminal and civil cases. If there is a difference it appears *criminalitee*.

It is contended further that the evidence must show a criminal intent to carry Webster out of the Kingdom. In every instance of negligence by omission amounting to crime, the rule of the law is this: If the neglect was so willful and gross as to satisfy the jury that the death of the party was intended, the crime is murder; but if death was not intended, but was the result of carelessness, it is only manslaughter. This principle applies to all that class of cases where neglect to provide suitable care, medical attendance or provision, to those persons whom it is our duty to protect and care for, and which result in fatal consequences. So, if a person whose duty it is to give the proper signal to a railway train in motion, whereby a collision took place and a passenger was killed, although not intentional, still it is criminal—but in lesser degree than when willfully and intentionally done. If this is the law *criminalitee*, it is a *fortiori curilitee*, unless the negligence of the injured party has concurred in producing the result, for in this consists the distinction between civil and criminal proceedings. In this case it appears that the libellant took the legal steps to prevent

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a passport being given, and none was given; there is no pretence that he has done or omitted to do anything to compromise his rights. I do not say that anything was incumbent on him to do, as the master of a vessel is prohibited from carrying a person out of the Kingdom who has not a passport. A notice to the Collector not to issue one seems to fulfill the requirement of the statute. The simple question to a person who applies for a passage is, have you a passport? if not, it is the duty of the master to decline to take him. It is by legal means that the intention of the Legislature must be ascertained, and by a careful reference to the whole statute, its clearly defined purposes and objects, as well as to the specific section by which the liability is incurred. And it would seem there could be no doubt of the intention. This is the only interpretation which can give effect to its different provisions. And is it not reasonable and in accordance with its objects? When governed by the principles of construction which I have given it is easily complied with. The salutary rule which governs society, that all men should obey the laws, and thereby impart a mutual protection to all its members, forcibly applies to it.

Let judgment be entered for the libellant for \$64, and costs.

Mr. Montgomery and Mr. Harris for the plaintiff.

Mr. Bates for the defendant.

SUPREME COURT—IN ADMIRALTY.

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UNDER the last clause of the 84th Article of the Constitution of 1852, declaring the judicial power of the Courts of this Kingdom to extend to all cases of Admiralty and maritime jurisdiction: Held, that it embraces two great classes of cases, viz: torts and contracts, the jurisdiction in the first depending upon locality, and in the last upon the nature of the contract; and also that it comprises cases arising under the general maritime law of the world, together with those appertaining especially to the admiralty jurisdiction of

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the nation, which last branch may be enlarged or circumscribed by the Legislature from time to time. .

A party plaintiff may appeal to a Court of Admiralty for redress, if the act prohibited is a marine tort and the remedy prescribed by the statute is such as a Court of Admiralty is competent to afford, although a Court of common law may also have concurrent jurisdiction of the matter.

Where the master of a vessel conveyed a person out of the Kingdom without a passport in contravention of law (Section 651, Civil Code) : Held, that a creditor of such person conveyed away might institute a suit on the Admiralty side of the Court against the master to recover his debt, though as against the master, the like remedy might be sought at common law.

Before Justice ROBERTSON—On appeal.

The libel alleges, in substance, that Michael Morton Webster, late of Honolulu, was and still is indebted to the libellant in the sum of sixty-four dollars ; that on or about the 8th of September last, the libellant having previously filed a notification at the Custom House to prevent the said Webster from obtaining a passport to leave the Kingdom, the respondent did, as master in command of the bark "Comet," trading to California, convey the said Webster out of the Kingdom without a passport, contrary to law ; and that the respondent has thereby rendered himself liable under the statute to the payment of the debt so alleged to be due from Webster to the libellant.

A motion was made by respondent's counsel before the single Justice to dismiss the libel, on the ground that it did not set forth a marine tort coming within the admiralty and maritime jurisdiction of the Court, but a case on which the remedy must be sought at common law. The Justice sustained the motion, and the libellant appealed to the full Court, before whom the question has been again argued.

The statutory provision upon which the libellant's claim is founded is contained in Section 651 of the Civil Code, and reads as follows : "Every master, or commanding officer of a vessel, who shall convey out of this Kingdom any person not having a passport shall be subject to a fine of fifty dollars, and be liable for all debts which such person may have left unpaid in this Kingdom ; and if he shall fail to pay such fine and debts, such vessel shall be subject to seizure, condemnation and sale for the payment thereof."

It is contended on the part of the respondent that the act

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complained of is not, properly speaking, a *tort*, although it may be an act of such a nature as would support an action at common law for the recovery of consequential damages ; that if it is a tort, it was created by statute since the adoption of the Constitution, and is not embraced in the last clause of the 84th Article, which declares the judicial power to extend "to all cases of admiralty and maritime jurisdiction ;" that the extent of our admiralty jurisdiction is to be measured by the general maritime law, and not by Hawaiian statutes ; and that, admitting that the Legislature might make additions to the jurisdiction by express enactment, it has not done so in this instance.

The clause of the Hawaiian Constitution, conferring Admiralty jurisdiction, is a literal transcript of the corresponding clause of the Constitution of the United States. In discussing the construction of the latter, Mr. Benedict, in his valuable treatise, says : "Every maritime nation has certain rules or laws in relation to ships, shipping and maritime matters, which are peculiar to itself—such as its navigation acts, its municipal regulations of its harbors, creeks, and bays, and navigable rivers, and of its own vessels, its rules in relation to drowned persons, wrecks, obstructions in rivers, prohibited nets, royal fisheries, and other *droits* of the Admiralty, constituting its maritime police. These were originally enforced by the Admiral exercising in part a high executive and administrative function, which was a portion of the royal prerogative, and was in substance confined to the waters and vessels of his own nation. The Admiralty Court was the forum through which, and by the aid of whose process, when necessary, these local municipal and administrative laws were enforced, and their violaters punished. These are, properly, the Admiralty laws of any country. Cases arising under these laws are cases of purely admiralty jurisdiction. Each nation has its own system of Admiralty law, which it changes and modifies at pleasure.

"So the word *maritime* is also to have its appropriate meaning—relating to the sea. The words admiralty and maritime, as they are used in the Constitution and acts of the Congress, are by no means synonymous, although able lawyers, on the bench as well as at the bar, seem sometimes to have so considered them. The word admiralty and the word maritime

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were evidently both inserted to preclude a narrower construction, which might be given to either word, had it been used alone."

"Maritime cases are more properly those arising under the maritime law, which is not the law of a particular country, and does not rest for its character or authority on the peculiar institutions and local customs of any particular country, but consists of certain principles of equity and usages of trade, which general convenience and a common sense of justice have established to regulate the dealings and intercourse of merchants and mariners in matters relating to the sea in all the commercial countries of the world."—Benedict's Admiralty, Sections 39, 40, 41.

In giving a construction to the constitutional provision above quoted, we cannot in my opinion, follow a safer guide than the decisions of the Courts of the United States relating to this subject. Those decisions are understood to have established that the grant in the Constitution, extending the judicial power to all cases of admiralty and maritime jurisdiction, is neither to be limited to, nor to be interpreted by, what were cases of admiralty and maritime jurisdiction in England when the Constitution was adopted; that the American Admiralty has a general maritime jurisdiction, embracing all maritime causes of action, as well in matters of contract as in matters of tort. That in matters of tort the jurisdiction depends upon the locality, and embraces all damages and injuries upon the sea. That in matters of contract the jurisdiction depends upon the subject matter—the nature of the contract—and embraces all transactions and proceedings relative to naval commerce and navigation. That the jurisdiction is not affected by the question whether the Courts of common law have jurisdiction in like cases, or whether the matter may have arisen within a port or harbor. And that the Admiralty has jurisdiction of all cases of maritime lien. [See Benedict's Admiralty, Section 261.]

I regard the admiralty and maritime jurisdiction of this Court as co-extensive, generally speaking, with that of the Admiralty Courts of the United States, except so far as the exercise of our jurisdiction may have become limited in certain cases by

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treaty. This is in accordance with the judgment of Chief Justice Lee, in the case of *Fessenden vs. the ship "Charles,"* Hawaiian Reports, Vol. I., page 94, and in the case of *Spencer vs. Bailey and Gilbert, ib.* page 108. The jurisdiction, so understood, embraces two great classes of cases, viz: torts and contracts—the jurisdiction in the first depending upon locality, (almost universally,) and in the last upon the nature of the contract. Again, the jurisdiction comprises cases arising under the general maritime law of the world, together with those appertaining especially to the admiralty jurisdiction of the nation; and the last branch may be enlarged or circumscribed by the Legislature from time to time. New prohibitory laws may be enacted affecting ships and seafaring persons, and new maritime offenses or torts may be created by statute.

In a suit upon an alleged maritime contract, it would not avail to answer that a suit had never before been brought in Admiralty for the same specific cause. The question for the Court would be, Is this contract in its nature, or subject matter, a maritime contract? If it is, the jurisdiction is clear. And so in this case, the simple question is as to whether or not the alleged illegal act of the respondent is a marine tort. It can not avail to say that if this is a tort it was created by statute subsequent to the adoption of the Constitution, and is therefore not included in the clause, "all cases of admiralty and maritime jurisdiction;" for to say that such clause embraces only cases which had arisen, and been entertained, previous to the adoption of the Constitution, is obviously unsound, as will appear by applying the same principle to the next preceding clause of the article referred to, relating to suits affecting ambassadors and consuls. Nor is it necessary, in my opinion, that the Legislature should have *expressly* enacted that the Court of Admiralty should have jurisdiction in cases arising under Section 651 of the Civil Code. I think it is sufficient reason for holding that the jurisdiction does attain, if the act prohibited is a marine tort, and if the remedy or redress prescribed by the statute is such as a Court of Admiralty is competent to afford. Where such is the case, it seems to me that a party plaintiff has a right to appeal to a Court of Admiralty, although a Court of Common Law may also have concurrent jurisdiction of the

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matter. And the objection that has sometimes been made, and always overruled, to the jurisdiction of Admiralty Courts in the United States, that the defendant did not have the benefit of a trial by jury, has but little weight here, where the Court may, at its discretion, impanel a special jury to try any issues of fact involved in the cause. (Civil Code, Section 1238.)"

It seems to me too that the redress allowed to the party injured in this class of cases is such as may be enforced by a Court of Admiralty with greater facility than by a Court of Common Law, at least in all cases where it becomes necessary to pursue the remedy as against the vessel. If the suit was brought at common law, and continued up to judgment, against the master, and it then became necessary to have recourse against the vessel *in rem*, that would necessitate, in my opinion, a resort to the Court of Admiralty. But if the suit is originally brought in admiralty, that Court is competent, by its peculiar process and powers, to afford the proper redress as against both the master and the vessel.

But it is argued on the part of the respondent that the act of conveying a debtor out of the Kingdom without a passport is not a tort done to the creditor, or, at all events, not a *marine* tort—such a tort or injury as can be made the basis of a suit in admiralty. I am free to confess that such was my own impression at first; but, upon examination, I think this objection cannot be sustained. If the master of a vessel conveys any person out of the Kingdom without a passport, in contravention of the law referred to, his act is first a violation of a local maritime regulation, punishable by fine; and then it is made by force of the statute a civil tort, or wrong, affecting the rights of any person to whom the party conveyed away may be indebted, for which, and for the fine, the master first and then the vessel may be held responsible to the amount of the fine and debt. The injury to the creditor is created by statute, and it is measured pecuniarily by the amount of his debt.

Counsel for the respondent, while admitting that *locality* is the test to discover whether or not any act complained of is a marine tort, argued that this Court cannot entertain a suit founded upon a tort or injury, which was not committed upon the person or property of some one, such person or property

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being at the time on the sea. In other words, as I understood his argument, that all marine torts are trespasses. But, it will be seen by reference to the authorities, that there is a class of wrongs, or torts, for which redress is given in admiralty, which are not trespasses to the person or property of the party suing. (Curtis' Ad. Digest, p. 35 ; Conkling's U. S. Admiralty, p. 329.) In the case of *Plummer vs. Webb*, 4 Mason's Rep. 380, it was decided that a father may maintain a suit in admiralty for a tortious abduction of his minor son, on a voyage on the high seas, in the nature of an action *per quod servilium amisit*, for it is a continuing tort. The same doctrine was held in the case of *Sherwood vs. Hall et al.*, 3 Sumner's Rep. 127, where the suit was maintained against the owners of the vessel in which the minor had been employed as a seaman. So in the case of *Steele vs. Thatcher*, Ware's Reports 85, where the suit was by the father against the master of the vessel. In that case the question of jurisdiction was raised, as in the case now before us, it being contended that, admitting the master's conduct to be illegal, and that he might be held to answer for it at common law, the subject matter of the libel was not within the admiralty jurisdiction. The objection was overruled by the Court, and Judge Ware, after a learned examination of the point, said, "In this case the question as to the jurisdiction must be determined by the locality of the act, whether it was done on the high seas. The act complained of by the libellant is the shipping his son, a minor, at Portland, and transporting him to parts beyond the sea, to wit, to Grenada, in the West Indies, without his consent. The contract was made on shore ; but the contract, admitting it to be illegal, does not constitute the tort. The execution of the contract is that in which the tort consists, and that was on the high seas."

If these cases are sound law, and I have no doubt it will be admitted they are so, it seems to me that the admiralty jurisdiction in the case now before us is clear ; for, if the respondent could be held to answer in admiralty for tortious acts beginning on shore, *a fortiori*, he may be held to answer there for the statutory tort of conveying a debtor out of the Kingdom without a passport, which, to use the language of the Court in the case of the *United States vs. "La Vengeance,"* (1 Curtis' Decis-

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ions of Supreme Court U. S., p. 230,) "is entirely a water transaction," and must, from the nature of the case, and the insular situation of the Kingdom, have been done upon the high sea; so that, in point of locality, even Lord Coke, with all his jealousy of the admiralty jurisdiction, would probably have admitted that it attached in cases of this nature, for he says, "*Altum mare* is out of the jurisdiction of the common law, and within the jurisdiction of the Lord High Admiral." (Co. Litt. 260, a.)

As additional cases in which it has been held that Courts of Admiralty can award damages for consequential injuries, arising from tortious acts, although not direct trespasses, I may refer to *Chamberlaine vs. Chandler*, 3 Mason's Rep. 242; the "*Betsy Caines*," 2 Haggard's Rep. 28. These, however, are not referred to as being precisely in point in the present instance.

I have examined the subject involved in this case with considerable care, because, where, as with us, the same courts and judges administer all the several branches of jurisprudence, there is some danger of the boundaries between those several branches being lost sight of; and because I concur in the opinion verbally expressed by the Chief Justice, that, while we will not refuse to hear in admiralty what may properly be propounded there, we ought, at the same time, to preserve to the subject, whether plaintiff or defendant, the right to a common law trial, so far as the law guarantees it.

In this case, I am of the opinion that the suit may be maintained in admiralty; although, so far at least as the remedy against the respondent in prison is concerned, it might be sought at common law, the jurisdiction being concurrent to that extent.

Chief Justice ALLEN concurred in the judgment.

Mr. Harris and Mr. Montgomery for libellant.

Mr. Bates for the respondent.

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SUPREME COURT—IN ADMIRALTY.

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THE liability of the master of a vessel for the debts of passengers, departing this Kingdom without passports, attaches when he has conveyed them across the exterior line of the exclusive jurisdiction on to the high seas.

If a person be taken on board, beyond such boundary, with the preconcert and complicity of the master, or any one under his command, said collusive acts being prior to passing the limit of exclusive jurisdiction, such conveying away of the debtor would be a violation of the law, Sec. 651, Civil Code.

A thorough and faithful search of the vessel previous to passing the boundaries of our jurisdiction, with a view to guard against persons making their escape : *Held*, to be a compliance with the law.

ALLEN, C. J.

This is an action for the recovery of certain liabilities alleged to be incurred by the defendant for conveying on board the bark "Comet," of which he was master, Michael Morton Webster out of the Kingdom without a passport. The case is before the full Court on an appeal from the decision of the Chief Justice, the principles of which we approve, and, therefore, it will be unnecessary to re-examine, in detail, the legal positions taken by the defendant.

The Court will remark, however, that they have especially re-examined the argument, that was pressed with so much zeal and ability before us, that the proof must be conclusive that the defendant had knowledge of Webster being a passenger on board the "Comet." We should regard this construction as very easily defeating the force of the statute, without any complicity of the master. This provision may be likened to many cases under the revenue laws, where persons incur liability for acts in which they do not participate, and have no knowledge.

The Court regard a thorough and faithful search of the vessel, previous to passing the boundaries of our jurisdiction, without finding the passenger, or such other course as evinces a careful and thorough diligence in guarding against persons making their escape, as a compliance with the law.

It has been contended, very ingeniously, that although this

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construction obtains, still the vessel was not out of the jurisdiction of this Kingdom, although she had passed the marine league over the sea adjoining its territories, and that if the passenger is discovered, as in this case, within four or five hundred miles of the port, or before he has passed into the jurisdiction of another Government, that it was the duty of the master to return and restore the debtor to the jurisdiction of his creditors. It is true that the Court has an admiralty jurisdiction, as contended, over the high seas, but the question before us to decide is, what is the true intent and meaning of the statute? The language is, that "every master or commanding officer of a vessel who shall convey out of the Kingdom any person not having a passport, shall be subject to a fine of fifty dollars, and be liable for all debts which such person may have left unpaid in this Kingdom." What is the meaning of the word "Kingdom" in this connection? Does it refer to the territory over which our laws exclusively prevail, including one marine league from the shore, or does it refer also to an admiralty jurisdiction on the high seas? Had the latter been the intention of the law, it should have been more explicit; for the usual and the legal meaning of the word "Kingdom" has no such extended application, and it would be doing violence to every principle of construction of a statute, penal in its character, to impart to it such an enlarged application. When the terms are used, "within the Kingdom of Great Britain," or "within the United States," jurisdiction is not claimed on the high seas. But it is contended with great ingenuity that the rights of the party are claimed on principles recognized by Admiralty Courts, which prevail over the high seas, and he seeks redress in a Court having admiralty jurisdiction. While this is true, the powers to be exercised in admiralty must be governed by law. It is true that it is a well settled principle of maritime law that owners are responsible in the admiralty for the torts of their masters, in acts relative to the service of the ship, and within the scope of their employment. This liability imposed by our statute was before unknown to the Admiralty. It is a new provision—a new prohibition—and, although we have regarded it as coming within admiralty jurisdiction, still it can only be exercised according to the meaning

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and extent of the special provision. It is not a liability incurred for the violation of any general principle recognized in the Admiralty, or of any statute of the country under which the bark "Comet" sails. It is founded upon a statute of this Kingdom, and it can have no greater force or extent than its terms impose. The act complained of is committed in passing the boundary of the Kingdom on to the high seas; the Admiralty, therefore, assume rightfully a jurisdiction, and if there is a defense at the time and place, can the liability be incurred subsequently on the high seas? There is no provision of law against taking a man on board a vessel on the high seas and giving him a passage to any part of the world. If, however, there was evidence of collusion originating within the jurisdiction, and to be carried out beyond it to defeat the spirit and purpose of the statute, unquestionably the legal liability would be the same; but there is no provision against conveying a person found concealed on board a vessel, when on the high seas, to the port of destination. It is said that the offense is committed and the liability incurred when the knowledge is imparted to the master that a passenger is on board without a passport. This cannot be a legal position, if the view we have taken of the jurisdiction of the Kingdom be correct. If the vessel is out of the Kingdom and a passenger is taken on board and conveyed to its port of destination, it certainly can not be a violation of a law which is limited in its operation to the distance to which this Kingdom may lawfully extend its exclusive dominion over the sea adjoining its territories. It is unnecessary to discuss the question of liability for taking a person on board beyond the exterior line of our exclusive jurisdiction, under circumstances which would naturally excite suspicions that he was trying to make his escape from the Kingdom whose laws he had violated, or from persons with whom he had incurred liability. The decision must be made according to the facts and circumstances of each case. If they connected the act with the master of the vessel, or any one under his command, prior to passing the boundary of exclusive jurisdiction, it would be a violation of the law. In this case it is admitted that the defendant was entirely innocent of any collusion, and ignorant of Webster's being on board at the time the vessel passed the boundary.

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The next and final ground of defense is, that the agents of the owners had made a thorough and faithful search of the vessel. Capt. Wilcox testifies that Wilcox, Richards & Co. were the agents of the bark "Comet" in September last, and that he was one of that firm at that time, and that after the vessel hauled off from the wharf he went on board, and said to Mr. Lemont, the first officer, and Mr. Ragsdale, the purser, you must look and see whether there are any persons stowed away on board. He said further, I will look into the cabin, and you may look forward into the steerage and forecastle; the hatches were caulked down; they went forward, and I went into the cabin and asked the steward if there were any strangers there. He replied that he did not know, whereupon I looked on one side while I went aft, and on the other side when I came back; I passed round the entire cabin, and the after cabin also. There was no one stowed away in any of the berths. I did not see Webster on board that day. Lemont and Ragsdale brought to me one man who had stowed himself away, and they said they could find no more. If Webster had been on deck, I should have seen him. He could not have been stowed away aft without being seen. The hatchways are usually closed in the morning, before the vessel sails, and then caulked down, as they were on this occasion. If he had been in the hold he could not have got out without the hatches being taken off. There are two hatchways on deck. There is also a small hatchway in the cabin, under the table, and another forward leading into the forecastle. I know the one in the cabin is caulked. It is not used. It has an oil-cloth over it. The table is stationary. I think there is another hatch leading into the run. It is used for stores sometimes. I did not move that hatchway or go down. I would not like to stay there a great while, it is so close. I did not think it was very likely that there would be anybody there. The table and carpets and scuttle have to be moved to get down there. It would be difficult to be stowed away there without some help. Search is always made by myself or Mr. Richards. After the search I left the vessel just off the esplanade, as she was sailing out.

It was admitted that Lemont and Ragsdale would, if present, testify that Mr. Wilcox ordered them to search the forecastle.

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and steerage while the said Wilcox searched the cabin, and that pursuant to said order the said bark was searched by the parties aforesaid, and that either Lemont or Ragsdale did find one man, who had stowed himself away in the fore-castle, who presented his passport and paid his passage, and that no other person was found on board who did not belong to the ship's crew or had a passport, and that M. M. Webster was not found or seen by any one of the parties making the search on board the said bark until the bark was four or five hundred miles from the port of Honolulu.

At the suggestion of the counsel for the plaintiff, the defendant was sworn, and testified that on Monday night, as he thinks, after leaving Honolulu, although he is not positive as to the time, but is quite sure that the vessel was four or five hundred miles from that port, the mate notified him that Webster was on board, and when discovered was standing alongside the fore-mast. I told him to call Webster aft, and I said to him I was very sorry to see him in that state. I did not inquire where he was stowed away. I knew there was no passage way from the fore-castle to the hold. I do not know whether there was any passage into the fore peak.

It is contended that reliance ought not to be placed on the evidence of Lemont and Ragsdale—that they are the very persons who would connive with passengers to get them out of the Kingdom, if they wished it. The same might be said of any one who should be directed to make the search. But this is not the proper mode to dispose of testimony which is unimpeached. When there is conflicting testimony, then the situation of the parties, and their liability to improper influences, is a proper matter of comment. But, as the evidence is given here, the danger of injury to the master and owners is so great, and the probable compensation which those persons would receive so small, that the Court cannot raise a presumption of false testimony on such premises.

It is further contended that search was not made by the master, or his order, and, therefore, not in conformity to law. The Court regard a search, instituted by the owners, as equally in compliance with the statute, as they are parties in interest. It is their duty as well as that of the master to prevent a vio-

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lation of the law, and it would be an extraordinary provision which should impose a liability and yet interpose obstacles to prevent the party from incurring it. The owners being proper persons to make the search, they can impose this duty upon the agents of their ship, which was done in this case.

We see no reason to make the rule more rigid than was prescribed by the Chief Justice, and we are of opinion that the testimony brings the case within that rule, and therefore judgment will be entered for the defendant.

In view, however, of the circumstances of the case, the costs will be paid equally by the parties.

Mr. Montgomery and Mr. Harris for the plaintiff.

Mr. Bates for defendant.

SUPREME COURT—IN PROBATE.

IN THE MATTER OF THE PROOF OF THE WILL OF JOSE NADAL.

WHERE the legal meaning and effect of the language used by the party, who prepared the instrument offered for Probate, differed materially from that of the language used by the testator in delivering his instructions : Probate of the instrument refused,

Besides mere formal proof of execution, the conscience of the Court must be satisfied that the instrument propounded is the last will of a free and capable testator.

Justice ROBERTSON delivered the decision of the majority of the Court as follows :

On the 9th of August last, the Right Rev. Louis Maigret, Roman Catholic Bishop at Honolulu, filed a petition, as sole legatee, for probate of the last will of Jose Nadal, late of Honolulu, deceased, before the Chief Justice at Chambers. The hearing was set for the 18th of August, and upon that day counsel appeared to contest the will offered for proof, on behalf of Prince L. Kamehameha. On the 6th of September, the Chief Justice gave judgment in favor of the validity of

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the will, and thereupon an appeal to the full Court was noted on behalf of the contestant.

When the matter came up for hearing on appeal, counsel for the contestant moved the Court to impanel a jury, to try the issues of fact involved in the cause, in virtue of Section 854 of the Civil Code, which provides that in all matters to be tried before a single Justice, a special jury may be impaneled, at the discretion of the Court, to try issues of fact. The Court overruled the motion on the ground that, by Section 1,241 of the Civil Code, it is expressly provided that all probate causes shall be heard and determined by the Court or Justice, without the intervention of a jury, making that class of cases, as it always was, before the enactment of the Code, an express exception to the general rule, as laid down in Section 854.

It appears, by the testimony, that Jose Nadal died in the Queen's Hospital, on the 3d of August, whither he had removed from Makiki about a fortnight before. On the 21st of July he executed a document, in the Hawaiian language, purporting to be a will, by which he bequeathed all his property to Prince L. Kamehamba, with a proviso that he should give a part of the property to the decedent's daughter, Catalina Nadal, who resides at Santa Barbara, in California; and on the 30th of July he executed the document now presented for probate, which is in the English language, and dated the 31st of July, bequeathing all his property to "the Rev. Dr. Maigret, Roman Catholic Bishop of the Sandwich Islands, his heirs and assigns," and appointing William Bromley Barnes his executor.

Nadal was afflicted for a number of years previous to his death with chronic rheumatism and asthma, and latterly with dropsy produced by disease of the heart. He was always a superstitious man—a believer in spectres and native charms. After entering the Hospital, his weakness in this respect became excited by disease, and by the fear of approaching dissolution. He was afraid, even in the day-time, to be left alone in his chamber for a week before he died, shedding tears if left alone, and saying that he saw supernatural sights and evil spirits. A woman died in the Hospital about the 26th of July, and he expressed his fear that her ghost would come for him. Sometimes

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he was observed to stretch out his hand, saying, "Go away, go away! I don't want you," as if speaking to some spectre which he fancied he saw. At times he conversed with another patient who slept in the same room about religion, saying he had been a great sinner, and asking to have portions of the New Testament read to him. He was visited by some of the priests and members of the Roman Catholic Church, to which he belonged. Bishop Maigret visited him a few days before his death. He was also visited by Mr. John Ii about the 1st of August, to whom he stated in conversation that he saw spectres, and was much troubled by some natives at Makiki, who were working incantations against him; and that he had made a will bequeathing his property to Prince L. Kamehameha, to whom, and to whose family, he expressed his gratitude for long continued favors. Some conversations between Nadal and other parties, in relation to his intended disposition of his property, were given in evidence. About four years ago he stated to Robert E. Wakeman that he should leave his property to the Bishop, as "that was his religion." Subsequently, he stated to Mr. Haa-lelea, and to Mr. R. G. Davis, at different times, that he intended to leave his property to Prince Kamehameha. For the last twenty-six hours previous to his dissolution he was in a comatose state. He is believed to have been a native of Spain, but had resided in this country for many years.

The validity of the instrument now presented as a will is contested on several grounds: First, that it is evidently the offspring of an insane state of mind—the result of mental terror, and not of natural desire or intention; secondly, that the will presented would carry the property to Bishop Maigret and his personal representatives, not to the Church, as Nadal intended; thirdly, that if it was made by the decedent for "the benefit and rest of his soul," it is a will to superstitious uses, and ought, therefore, to be held void.

Upon examining the evidence, we find one deficiency in the proof of the execution of the document. By Section 1465 of the Civil Code, it is required that every will shall be "attested by two or more competent witnesses subscribing their names to the will, *in the presence of the testator.*" There are two subscribing witnesses to this instrument, but it is not expressly proven

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that one of them, Alfred Doiron, subscribed his name in Nadal's presence. If the Court should refuse probate on that ground, the proponent might, probably, under our practice, renew his application, upon affidavit ; and as the contestant has not raised the objection, we presume he is satisfied from all the evidence that the document was in fact executed with the formality which the statute prescribes.

There is another and a much more important point in the cause, which constitutes the second ground of objection raised by counsel, and which should naturally be considered and disposed of before adverting to the other two. The point arises from the apparent variance between the form and legal effect of the instrument now propounded, and the verbal instructions which the decedent gave for the preparation of a will. Admitting that the document now presented was duly executed by the decedent while he was possessed of full capacity to make a disposition of his property, there is still a most important question to be determined by the Court, as to whether or not this instrument does in fact express *the will* of Jose Nadal ; for it is the mental volition, the intention and consent, of the party, that give life to the instrument. "A will," says Sir John Nicholl, "means not barely the signing of it, and the formal publication or delivery, but proof in the language of the *condidit*, that he well knew and understood the contents thereof, and did give, will, dispose and do, in all things as in the said will contained." (*Zacharias vs. Collis*, 3 Phillimore, 179.) Swinburne, in his excellent Treatise, says, "This word *Testamentum* is as much as *testatio mentis*, that is to say, a testifying or witnessing of the mind." And in giving the definition of a testament, he says, "A testament is a just sentence of our will, touching that we would have done after our death." And, again, "For without meaning or consent of mind, the testament is altogether without life ; and is no more a testament than a painted lion is a lion." (Swinburne on Wills, Part First, Secs. 1, 2, 3.)

Let us now refer to a portion of the testimony in the present cause. It appears that Nadal was visited at the Hospital by Mr. Jason Perry, a Portuguese by birth, and a friend of the decedent. Mr. Perry, who is the chief witness introduced to establish the will now propounded, is an intelligent and highly

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respectable member of the Roman Catholic Church. He stated that Nadal requested him to have a will drawn up disposing of his property, and told him how he wished it made ; and that he communicated Nadal's instructions to Mr. Walter Lee, a solicitor, who drew the will now presented. Upon the question being asked by counsel, " Did Nadal direct his property to be left to the Bishop personally ? " the witness replied " Yes," and then repeated the decedent's *own expression*, " To the Roman Catholic Bishop, he said, for the benefit and rest of his (Nadal's) soul. I told Mr. Lee that the will was to be made for *the benefit and rest of his soul*. I cannot say how it was that it was drawn to Bishop Maigret, his heirs and assigns." And on being asked, as a Roman Catholic, what he understood by the decedent's words, he replied, " I should say that the words, ' to be for the benefit and rest of his soul,' mean, for prayers for the rest of his soul." In the incidental conversation with the witness Wakeman, too, it may be observed that Nadal said, " he should leave all his property to the *Catholic Bishop, because that was his religion* ; " the fair import of which expression we understand to correspond with the witness Perry's explanation of the decedent's language to him, viz : an intention to bequeath his property to the person holding the office of Bishop at the time of his death, for the purpose of having masses or prayers said for the rest of his soul ; for his *religion* did not require him to bequeath his property to Bishop Maigret personally.

The variance, as to legal effect, between the instrument drawn by Mr. Lee, and an instrument drawn in accordance with Nadal's instructions to Mr. Perry, is quite clear. The first is a will in favor of Bishop Maigret, as a private individual, to the sole use and benefit of himself and his personal representatives, while the other would have been a will in favor of the Roman Catholic Bishop, in his official capacity, as trustee for the Church, to secure the celebration of masses or prayers for the rest of the testator's soul ; that is to say, a will in favor of the Church. This distinction was not overlooked by the proctor for the proponent, who, in the course of his argument, admitted that if the Court could find this document to be a will in favor of the Church, his client could not take under it. He argued correctly that this is a will in favor of Dr. Maigret and his heirs ;

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and in order to remove any doubt as to his client's capacity to acquire property to his private use, he introduced as a witness Mr. Modeste, a Roman Catholic priest, who testified that the clergymen of that Church here are of the order of the Sacred Heart, and are not precluded by the rules of their order from acquiring property to themselves, by inheritance, gift, or any other legal way.

The very fact that this is not a will in favor of the Church, but a will in favor of an individual, forms the first point at issue, and first strikes at the validity of the instrument; for, while the law has not made it requisite that a will should assume any particular form, or be couched in language technically appropriate, it should disclose the real intention of the maker respecting the posthumous destination of his property. (Jarman on Wills, Vol, I., page 13.) But it is argued that the document now presented was duly executed by Nadal, after it had been read over to him, and had received his approval, and therefore with a proper knowledge of its contents and import. Under the circumstances of the case, the onus clearly rests upon the proponent to establish that position. Speaking of the rules governing cases where wills are prepared by parties who take an interest under them, and thereby suspicion is raised as to the validity of the wills, which rules would seem to be equally applicable in cases like the present, the learned Mr. Baron Parke, in *Barry vs. Butlin*, said, on behalf of the Judicial Committee of the Privy Council, "The rules of law according to which cases of this nature are to be decided do not admit of any dispute, so far as they are necessary to the determination of the present appeal, and they have been acquiesced in on both sides. These rules are two, the first that the *onus probandi* lies in every case upon the party propounding a will, and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator. The second is, that if a party writes or prepares a will, under which he takes a benefit, that is a circumstance which ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favor of which it ought not to pronounce unless the suspicion is removed, and it is judicially

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satisfied that the paper propounded does express the true will of the deceased. These principles, to the extent that I have stated, are well established." (Jarman on Wills, page 44, note 4.) The same principles, we apprehend, are applicable in any case, where from the circumstances there are well founded doubts as to whether or not the testator had full knowledge of the contents, and legal import, of the instrument propounded. Mr. Surrogate Bradford, of New York, in the case of *Burger vs. Hill*, which is a case much in point, held that, besides being satisfied as to the capacity of the decedent, it is for the Probate Court to determine, whether in performing the particular act in question he had an intelligent understanding of the contents and effect of the instrument executed as a will; and that, generally, the *animus testandi* is to be inferred from the act of signing and formal publication; but where the capacity is weakened and impaired, though not destroyed, and there is evidence of undue influence, fraud, imposition, or mistake, the presumption derived from formal execution, may be diminished or entirely overcome. (Bradford's Rep., Vol. 1, page 360.) The same learned Judge held, in the case of *Weir vs. Fitzgerald*, that, "Besides mere formal proof of execution, something more is necessary to establish the validity of a will when, from the infirmities of the testator, his impaired capacity, or the circumstances attending the transaction, the usual inference cannot be drawn from the formal execution. Additional evidence is required that his mind accompanied the will, and that he was cognizant of its provisions." (Bradford's Rep., Vol. 2, page 42.) The language of Bradford, in the case of *Burger vs. Hill*, is applicable in the present case. Speaking of the testator, he said: "He obviously meant to make a will, but whether he intended to make this particular will, whether his instructions were comprehended, whether they were correctly put in writing, whether when the will was read he understood its contents, whether they conformed to his real wish, whether in fact this is his will, is to be determined only by a considerate examination of all the circumstances attending the transaction."

In addition to the fact that the instrument propounded in this case was duly executed, there is proof that it was read over to the decedent in the English language by Mr. Perry.

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who, on his examination, said, "I took the will to be signed on the afternoon of the same day that it was made. I read it over to him slowly. I asked him in English if he understood what I was reading, and he said he did; and after he had signed he began to speak Spanish. I don't know whether he understood what ostentation meant or not. I think he understood enough to know the meaning of the will." Mr. Doiron testified: "I heard the will read over by Mr. Perry. The deceased seemed to understand it. Perry asked him twice if he understood it, and he said yes."

On the other hand, it is clear, as already observed, that the instrument varies materially from the instructions given by Nadal to Mr. Perry only a few hours before it was signed. It is apparent, from the testimony of Langherne Desha, the assistant of the Hospital Physician, George Champlin, who slept in the same room, and of others, that Nadal was much troubled at the approach of death, and about his soul's welfare. Desha testified that during twelve years service as an assistant practitioner, he had seen many persons die, of various races and creeds, but he never saw any one so much frightened at death as Nadal was. It seems to us evident, then that, as death drew near, Nadal, either by the advice of friends, or promptings of his own heart, formed the purpose, natural to a superstitious mind, of providing for his future peace by disposing of his goods, so far as he was then capable of making a disposition, for the procurement of prayers "for the benefit and rest of his soul." There is no evidence that he subsequently changed his mind in regard to the destination of his property, or that he was aware that the will prepared for him did not conform to his desire. The English language, in which the document is written, was to him a foreign language, with which he was but imperfectly acquainted. His execution of a will in that language is like the execution of a will by a person who is unable to read; for it is not shown that he could either read or write it. On the contrary, Mr. Perry, who was for eight years his next door neighbor, and his intimate acquaintance, said he had never seen him write anything but his own name, Jose, nor read any language other than the Spanish. We think it would be a violent presumption, indeed, to suppose that Nadal was

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aware of the variance between the paper drawn up for him and his instructions ; for Mr. Perry, who is a much more intelligent man, did not understand the difference till it was pointed out by counsel, and of course he did not direct the decedent's attention to it.

Can the conscience of the Court, then, be satisfied, upon the evidence adduced, that this instrument does truly express the *last will* of Jose Nadal as to the disposition of his property? Does it disclose his *real intention* respecting its destination? We think not. There is not a particle of proof that Nadal was upon intimate terms of friendship with Bishop Maigret, or that he ever intended to bestow his property upon him, as an individual, because of any obligations which he felt himself under to the Bishop personally ; but, on the contrary, it seems to us clear as evidence can make it, that, while seeking to quiet his fears by making a will in favor of the Church, and so providing a fund of prayers for his soul's peace, he has, through mistake, or the misapprehension of other parties, been made to execute such an instrument as he never intended.

The question here involved is not of a nature to be decided by rules of legal construction. There is no controversy as to the meaning and effect of the language actually used in the document ; and there can be no doubt that the meaning and effect of the language which Nadal used, in delivering his instructions to Mr. Perry, are entirely different from that of the language which has been used by those who prepared the instrument. The rules of construction, therefore, are not applicable here—there is no room for their operation. The question raised is one which must be decided before construction becomes necessary. It is a question of fact, as to whether or not the language used in the paper accords with the language used by the decedent in giving his directions. In our view, the evidence shows, conclusively, that it does not. The objection now discussed may be illustrated by supposing that Nadal had intended to bequeath his property to some charitable institution, such as the "Queen's Hospital," for instance ; but that he had, through mistake, or the misapprehension or disregard of his instructions by others, been made to execute a personal bequest to "*A. B., President of the Queen's Hospital Association, his heirs and assigns,*"

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thereby diverting the property to private use. Upon the mistake being clearly proven, could A. B., or his heirs, take the property, directly in the face of the decedent's intention, and to the exclusion of his daughter, Catalina Nadal? Certainly not.

This objection is, in our opinion, fatal; for, if the Court should allow this instrument to stand, it would, it seems to us, fail in maintaining those principles of law which operate as necessary safeguards for protecting the rights of all parties interested in the posthumous disposition of property.

We deem it unnecessary to examine or to express any opinion upon the questions raised as to the decedent's sanity, or the extent of his testamentary capacity, at the time this paper was signed; and as to whether or not a will made according to Nadal's instructions, would have been a will to "superstitious uses."

Probate of the instrument propounded is refused.

February 20, 1861.

DISSENTING OPINION OF ALLEN, C. J.

The majority of the Court are of opinion that the variance between the form and legal effect of the instrument propounded, and the verbal instructions which the decedent gave for the preparation of a will, is fatal, and, therefore, it becomes unnecessary to examine any other points which have been made in the case.

In considering this position, it is necessary to examine carefully the testimony applicable to this part of the case.

The decedent had been afflicted with asthma and cough for a long time, and had been removed to the Hospital about a fortnight before his death. The witness, Mr. Perry, a very reliable and intelligent man, testifies that he had known him since 1851, and had lived next door to him for eight years, and was intimately acquainted with him; that he called upon him at the Hospital on the day before the will was made; that he, Nadal, directed him to have a will made, and he testifies that he did so according to his instructions; he further affirms that when

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he took the will to him, he read it over to him carefully, and he says, "I asked him if he understood what I read, and he said he did." There was another person present when the will was executed, who heard Mr. Perry read it to the decedent, and ask him twice if he understood it, to which he replied that he did. "He directed me to leave all his property to the Bishop personally, and he then added, 'To the Roman Catholic Bishop, for the benefit and rest of my soul.'"

It appears that the will was drawn in favor of the Bishop personally—and this is in conformity to his directions—unless this was modified by his subsequent declaration that the will was to be made to the Roman Catholic Bishop for the benefit and rest of his soul. The will was written without regard to the qualifying words, and on being read carefully over to him, was approved by him. If this was done understandingly, as the testimony is, it was an approval of the will as written, and in conformity to his first directions. It was clearly read, and he was carefully interrogated, and he appeared to understand the nature of the will. If he did so, it was clearly an approval of the will as written. It is the opinion of the witnesses that he did, although the will was drawn in the English language, yet the language was familiar to him, and to the witness, as well as his native language, so that there was no danger of misapprehension. That he had entertained at different periods different views of disposing of his property is undoubtedly true ; at the same time the present disposition is in accordance with his expressed opinion. It is very clear that this disposition of his property was probable. He had been separated from his family for nearly thirty years, and as it appears, from his declaration, he had thought that his daughter was well provided for. He was not a devotee to the Church, or constant attendant, yet he was undoubtedly on pleasant terms with the Bishop, and from early associations allied to that Church. It does not appear to me that although he said, in giving directions about his will, that he wished a disposition which should be for the benefit and rest of his soul, that it carried an intent that this property was to be set apart, and the interest of which was to be devoted to the perpetuation of prayers, during all ages, for the peace and rest of his soul. He had a religious

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sentiment which influenced his mind, as well as a regard for the Bishop, in whom he had confidence that the property would be disposed of for the best and most useful purposes. His instructions were in favor of the Bishop, and expressing the opinion, which was natural to one in his frame of mind, that it would be for the peace and rest of his soul. I do not regard it as having a controlling influence over the terms of the devise, but the language which he used, that the devise should be made to the Bishop personally should control. So that in either event, whether regard is had to the words originally used in giving the direction, or whether the knowledge of the will as drawn, which was so carefully communicated to him by the witnesses, Perry and Doiron, it does not appear to me that there has been any mistake, misapprehension or error. He was a weak minded man, with strange fancies and superstitious notions, but he had, as I think from the evidence, sufficient testamentary capacity, and a clear intention of his own purposes and designs at the time of the execution of the will.

Let us consider the intent he had in the use of the language: That he had a religious sentiment in its use, is very clear, and that this influenced him in making a devise to the Bishop, still it will not be considered as a reason for defeating a will, because, without influence, with a free and independent mind, a person makes a will to a religious teacher, if he does entertain the belief and hope that the property may be used for the promotion of religious objects. It is placed at the disposition of one in whom he has confidence, to be used as he may deem best for the interests of himself and heirs, and the promotion of such objects as he may regard useful. It is not the province of the law to analyze the sentiments and feelings which dictated a devise. Every man is entrusted with an enlarged discretion in relation to the disposition of his property, and this disposition should not be interfered with if the deviser has a sound and disposing mind and memory. Dr. Hillebrand, who was the medical adviser of Nadal, testifies that he had been acquainted with him many years; he was called to minister to him the day before he entered the Hospital; he says his mental condition was the same as it had been for the previous four months, but his bodily symptoms were not so good—he

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had dropsy ; he saw him every day while he was in the Hospital, and conversed with him ; for some twenty-five or twenty-six hours before his death he was in a comatose state ; but, up to that time, his mental condition was the same as usual ; he was in his usual state on the 1st of August, and all the time previous to it ; he did not observe any falling off of his mental capacity from the day he saw him at Makiki until the 1st of August ; he should judge that he was capable of managing his own affairs up to that time. He says, on one occasion Nadal said to me, pointing to Bishop Maigret, "The Bishop will look out for you"—I suppose he meant in regard to my bill. He referred to the Bishop in respect to the settlement of some other items of business, fully showing that his mind was fixed and clear in this purpose. He says that Nadal was a weak minded man ; that he was cautious and looked after his own interests ; he was very fond of money ; he was a superstitious man, and was alarmed at the prospect of death, and disturbed at the apprehension of spirits. But the opinion of his medical adviser, who had known him so long and so well, upon his mental capacity, is worthy of great consideration. It is a safer opinion to rest upon than to embark in speculations and conjectures. There is other evidence which sustains this view of the doctor, that his mental capacity was sufficient to give direction to his own business. In the case of *Berger vs. Hill*, 1 Bradford's Rep. p. 362, the Court says :

"The standard of capacity necessary to the performance of a valid testamentary act, is fixed by the law, in as precise terms as possible. Abstractedly speaking, capacity or incapacity can of necessity, be defined only by a general positive or negative expression ; soundness or unsoundness of mind and memory. The judicial interpretation given to these terms leads to the established proposition, that mere imbecility or weakness of understanding or memory, is not sufficient of itself, and apart from the particular act, to disable a person from disposing of his property by will. (*Stewart's Ex. vs. Lispinard*, 26 Wend, 255 ; *Blanchard vs. Nestle*, 3 Denio, 37 ; *Clark vs. Sawyer*, 2 Comstock, 498.)

"Mere weakness of understanding is no objection to a man's disposing of his property by will, for Courts cannot measure the

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size of people's understanding and capacities, nor examine into the wisdom or prudence of men in disposing of their estates." (1 Jarman on Wills and authorities there cited.)

From this evidence, I am of opinion that he had sufficient capacity to sustain a testamentary act. In this case the Court is free from a very embarrassing difficulty, which frequently occurs, and that is, to determine whether the deceased was the subject of undue influence and imposition at the time of the execution of the will. There is no evidence of an effort on the part of any one to influence him in the terms and conditions of the will. He gives directions for the will, and it is made in conformity with his wishes, as I think. It is in evidence that he had entertained different views in relation to the disposition of his property. This is not unfrequent. But the question, as the case now stands, is whether the will is made in conformity to instructions. I regard the evidence as conclusive that he had sufficient mental capacity to make a will; that his instructions were clear to make the will to the Bishop *personally*; and that it was made in pursuance of said instructions. This is wholly incompatible with a devise to the Roman Catholic Church. I see no possibility of mistake to one who had a disposing mind and memory, whether a devise to Mr. A. *personally* would convey the property to Mr. A., president of a charitable association. This very language indicates clearly that the intent was to devise the property to the Bishop, and not to the Church. Evidence has been fully given in relation to the intention of the decedent of the disposition of his property at different times, and the will is in accordance with his intention as previously expressed, although he had not been uniform in this expression. There is no question of fraud, imposition, or undue influence, relating to the making of the will—no ambiguity exists on its face, and no uncertainty as to person or the property—and in view of all the circumstances, and especially of what transpired at the time of making the will, I am satisfied that he was clear in his testamentary intentions, and that the will contains them.

In the construction of the will there is no doubt. It is clear and explicit in its terms—and the intention of the testator is manifest, and no surmise or conjecture of any object of what the testator may be supposed to have had in view, should be

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allowed to have weight either in giving construction to a will, or in defeating it. It must be proved, and to set aside the clear and explicit terms of a will by declarations of an uncertain intent and meaning is against the principles of construction recognized by all legal writers. In the case of *Doe dem Givillium* (5 B. & A., 129), Baron Park said, "It is often extremely difficult to say what the actual intent of a testator was; the Court is to ascertain not what the testator actually intended, but what is the meaning of the words he has used. It must be often matter of mere conjecture what he actually meant to be done, but there can be no doubt whatever what is the meaning of the words he has used." Here, in this case, if we abandon the force of the declaration that the will was to be made to Bishop Maigret personally, and that it was in fact so made, and signed after the same was carefully read over, and give way to conjectures of what his intent may have been, in the use of the language that the disposition of his property should be for the benefit and rest of his soul, the result of an adjudication must be singularly uncertain. It would be dangerous, it seems to me, to leave the strong holds of a case, and embark on the uncertainties of qualifying declarations, although made at the time directions were given to have the will made, when it appears that the will was made without reference to such qualifications, carefully read over to the testator, and by him approved.

While I have great respect for the opinion of my brethren, I feel constrained to say that, in my judgment, the will of Jose Nadal should be admitted to probate.

Mr. John Montgomery, for petitioner.

Mr. C. C. Harris, contra.

March, 1861.

C. N. Spencer v. N. F. Bennet *et als.*

SUPREME COURT—IN EQUITY.

CHARLES N. SPENCER *vs.* N. F. BENNET *et als.*

AN AGENT executing his authority within the usual scope of the business entrusted to him, binds the principal by his acts.

If there are any express or unusual limitations, binding the exercise of such authority in the ordinary course of the business, they cannot affect the right of the purchaser, who dealt with the agent in ignorance of them.

An authority to sell, implies an authority to sell on a credit, if that be usual.

The allegation of fraud is not sufficient; it must be proved, not surmised. The Court will be cautious in sustaining charges of this character.

ALLEN, C. J.

The complainant alleges that the respondents are owners of the brig "Mary Ellen," and a cargo of lumber, part of which is on board, and the balance on the wharf in Honolulu, adjacent to said brig; and that Thomas Spencer, one of the respondents and owners aforesaid, residing at Hilo, was duly authorized to make sale of said cargo, and that he did enter into a contract with him for the delivery of the same about the 1st of Feb., when it should arrive at Hilo, at twenty dollars per thousand feet for boards, and five dollars per thousand for shingles, of which there was a memorandum in writing. He further alleges that the brig arrived at Hilo, and that he was ready on his part to complete the contract, but that the master of the brig, who is also one of the respondents, refused to land the cargo, and proceeded with the same to Honolulu.

The respondents deny the authority of said Spencer to make the contract with the complainant for the sale of the lumber; they declare that the agent of the vessel, Mr. J. S. Walker, and a respondent in this suit, ordered certain articles, such as flour, hams, potatoes, etc., designed especially for the whaling fleet at Hilo, together with two hundred thousand shingles, and the balance of room in the vessel to be occupied with assorted lumber, such as last cargo, which they thought at the time, would be but a small portion of the cargo. They further allege that the master, apprehensive that the vessel would not arrive in time for effecting sales to the fleet, made larger purchases of lumber than it was originally intended. They further say that

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it was arranged by the owners that the vessel on her return should first visit Hilo, in order to supply the defendant Spencer such portions of said edible cargo as he might find a demand for by the whaling fleet, and such portions of the lumber as he might require in the legitimate course of his business.

The first question which arises is, had Spencer authority to make sale of the cargo of the "Mary Ellen," and, was he under any limitation of power so to do? It is admitted that the cargo was ordered for the Hilo market, and that the same was to be consigned to him. This was the agreement at the time the vessel sailed from Honolulu. So far then as the owners were concerned, they were bound by his contract, if his authority was without limitation. Spencer swears that the lumber was the material portion of the cargo, which he wanted at Hilo, and he was to take the whole of it if he pleased, the same as he had a right to take any other article. He testifies that he had unlimited control of the sale of the cargo at Hilo, by agreement with the agent of the brig at Honolulu, at the time the memorandum of the cargo was made up. But, it is asserted that the brig has brought more lumber than was expected, and, therefore, Spencer was not authorized to make a sale for the whole amount brought. The respondent testifies that, if all the articles ordered had been put on board, she would have brought about fifty thousand feet, whereas she brought sixty-seven thousand feet. There would be force in the reasoning, so far at least as the agent is concerned, that if ten thousand feet of boards were ordered only, whether it would be competent for him to make sale of the cargo, should there be one hundred thousand feet, and he would be responsible for any violation of his duty. It would be a different state of facts from what any of the parties anticipated. It appears by the evidence that Mr. Spencer sells lumber on commission, and had on hand on the 1st January one hundred and two thousand feet. Now, on the answer alone of the defendant, was this sale in the legitimate course of his business, and especially when the course of business of importing merchants is regarded? Was it not his duty to make sale in bulk, if he obtained the full market price, rather than to have enhanced his commission, and prolonged the adjustment of the adventure by retailing it? It seems to

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me that it was the exercise of a sound discretion and clearly within the powers and duties of his agency. When there is added to this the position and unequivocal testimony of Spencer, that he was, by express agreement, to have full power and control over the consignment, the question of authority is beyond controversy.

It is in testimony by Mr. Raplee that he was present when the memorandum for the cargo was agreed upon, and the understanding was that the brig was to touch, first at Hilo, when she came back for the purpose of discharging whatever part of the cargo Capt. Spencer might dispose of, or require ; I cannot say that they had any idea that he would sell the whole cargo in bulk, but my impression is that they had no idea that he would sell it in bulk. I do not think there was any prohibition to Spencer from selling the lumber.

It is further contended that the sale was fraudulent ; if this is proved, the sale is void ; but, fraud must be proved, not surmised. The allegation is not sufficient. It is contended, first, that Spencer had no right so long before the arrival of the vessel to make a sale, and especially to his brother. The vessel had been absent from Honolulu from the 9th January to the 4th February, twenty-five days, and she could reasonably be expected in forty or fifty days. It appeared in evidence that the cargo, prior to this, sold at Honolulu for \$16 50 per thousand, less some expenses, and there is no evidence that Spencer had received intelligence that lumber would probably rise, and in point of fact, there was no advance in Honolulu till February 4th, the very day this contract was completed in Hilo. The letter of Mr. Walker informing Capt. Spencer that lumber was rising in the market was dated the 4th at Honolulu,—of course Spencer could not have had this intelligence. But as the agent at Honolulu had made sale of the lumber on the 31st of January to arrive, the owners cannot with good grace complain of their agent at Hilo for selling on the 4th February the cargo to arrive. The price which the agent of the brig sold the cargo for at Honolulu, was \$22 per thousand and \$4 75 per thousand for shingles, on four months credit. While Spencer, the agent at Hilo, sold the boards for \$20 per thousand and \$5 per thousand for shingles, on 60, 90, 120 days, which is an average of three months,

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and the additional expense of delivering the lumber at high water mark, but this expense was not accurately proved. This difference is not sufficient to brand the transaction with fraud—so far as price, time of credit and time of sale in advance of the arrival of the cargo applies. The same objections exist against the sale at Honolulu and Hilo, but there is no evidence of fraud in either case, but as much in the one as the other.

It is further contended that Charles N. Spencer, being a brother of the agent, was evidence of fraud in the sale; if there were other evidence of a fraudulent character, this relationship would have weight. We look with great caution upon contracts made with relations, and if there are badges of fraud in the circumstances of the negotiation, it would be void, and it is said that he has no property, and, therefore, not worthy of credit. He is represented to be a young man of industrious habits and worthy of confidence, and that the merchants would give him credit to the amount of this purchase, if it was apparent that a sale could be made of the goods purchased. Captain Spencer says he has not had a settlement with his brother, who has been in his employment some eight years, but he believes that he is owing him a considerable sum of money, and that he has unbounded credit with him. Although I do not regard that there is the slightest evidence of fraud in this transaction, still when the kindred of an agent for the sale of property are proposing to purchase, it is the safer and better way for the agent to consult the principal especially, and procure his approval in all cases, when it can seasonably be done. It is in better taste and better judgment. Fraud ought not to be lightly charged. Reputation and credit are valuable to all men, and none more so than to merchants, and courts will be very considerate and cautious in sustaining charges of this character. There are many other circumstances commented upon, which it is contended are evidences of fraud—such as not notifying the agent here of the sale, especially when he wrote him on other subjects immediately after the date of the sale. This might, in connection with other circumstances of fraud, have some weight—but as none exist, this omission of itself has no weight. It would be weak evidence of itself to convict a man of antedating a contract for a fraudulent purpose.

But, if the agent had executed his actual authority—if the purchaser did not know it—the principal is bound, unless the agent went beyond the usual scope of business. If there are any unusual limitations, it must be in evidence that the party dealing with the agent knew them. It is admitted that the sale was to be made in the usual course of business. Now, unless express stipulations are imposed upon one to sell by retail, I should regard it within his discretion to sell in any quantity he deemed advantageous to his employers. Indeed, sales for importers by the quantity are preferred, and it may be called the usage, and the sales by retail exceptionals, and which, to justify the agent, would require particular limitations; still these limitations cannot affect the right of the purchaser, who dealt with the agent in ignorance of them. The respondent's testimony is not sufficiently clear to fix any limitations, for, while he testifies that the agent had authority to dispose of such portion of the cargo as he pleased, it was his impression that it was not to be sold in bulk, although, he says, there was no express prohibition, and if there had been, it is not in evidence that the complainant knew it, and, therefore, cannot affect his rights. If a person puts goods into the custody of another, whose common business it is to sell without limiting his authority, he thereby confers an implied authority upon him to sell them. An authority to sell implies an authority to sell on a credit, if that be usual. (*Pickering vs. Bush*, 15 East. 38; *Soltus vs. Everett*, 20 Wend. 267, 280; *Anderson vs. Coonley*, 21 Id. 279; *Valentini vs. Piper*, 22 Pick. 92.) In this case the cargo was consigned to the Hilo market in the first place, and Spencer had the usual powers of a commission merchant in making the sale; and, therefore, whatever was done by him within the legitimate scope of such authority was obligatory on his principal. A commission merchant should be very cautious in making sales in advance of the arrival of the cargo, for it is his duty to see that his principal shall have the chances of a profit; at the same time, if his conduct is not judicious while he acts within the scope of his authority, third parties are not to be injured by it, nor his contract with them to be defeated, and especially when it would implicate three respectable men—and when two of whom had sworn that the contract was made on the date it purports to be.

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In the letter of Mr. Walker to Mr. Spencer of the 18th February, he reasons upon the advantages of the sale to Lewers as tending to advance the price of lumber, and that would be for his interest, by giving him the control of it, but he does not intimate that his sale should supercede Spencer's, because he had no authority to make the sale at Hilo.

The authority having been conferred upon the agent at Hilo, continued until withdrawn, and, therefore, a sale made at Hilo while the authority subsisted was obligatory on the principals, and it is not alleged that the authority given him, when the memorandum of the cargo was made, had been withdrawn, or in any degree modified, at the time of sale to complainant.

The decree therefore is, that the respondents deliver to the complainant the lumber now on board the brig "Mary Ellen," and that which has been unladen from her since her arrival in the port of Honolulu—and for costs.

Mr. Harris for plaintiff.

Mr. Montgomery for defendant.

May, 1861.

SUPREME COURT—IN ADMIRALTY.

FREDERICK BURRMEISTER *et als.* vs. WHALESHIP "SPEEDWELL"
AND HER OIL.—C. A. WILLIAMS & CO., CLAIMANTS.

IN CASES of shipwreck, seamen are entitled to recover their wages out of the proceeds of the wreck saved by them.

Where it is proved to the Court that the only security for the seamen is their lien on the property within our jurisdiction, the voyage being broken up and abandoned, the Court dispensed with a fulfillment of the conditions of their contract of shipment, as to the mode and time of payment, and decreed them a compensation equivalent.

Seamen are bound to exert themselves to the utmost to save the vessel and cargo from peril, and as a general principle are not entitled to any consideration for such service, beyond the means furnished by the property saved for the payment of their wages.

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As recognized in the case of the ship "Natchez," decided by this Court, (Hawaiian Rep., Vol. 2, p. 34,) before the seaman can be entitled to any extra remuneration for services, in saving the vessel and property, his relation to the vessel must be dissolved, and the obligations of his contract cease to be binding, as by an abandonment of the voyage, etc.

Courts of Admiralty will re-examine, if necessary, settlements made with seamen, and decree equitable compensation for services rendered, notwithstanding a receipt in full may have passed from the seaman.

ALLEN, C. J.

This is a libel *in rem* against the whaleship "Speedwell," of Fairhaven, and a certain amount of oil, being a portion of her catchings, by Richard Cumings and others, seamen attached to said vessel, to receive compensation for their shares, or lays, in said oil, and for services rendered to said vessel and oil. The material facts in the case, as they appeared by the pleadings and proofs, will be stated in the opinion of the Court.

It appears that a portion of the libellants shipped on board the "Speedwell" at New Bedford, and others at this port, and at Fayal, but all were shipped for the voyage. The ship had been in the whaling service three seasons, as the testimony is, and therefore I infer she sailed from the home port in the fall of 1857. It appears further, that the master has sent to the owners from this port, in the years 1858, 1859 and 1860, oil and bone, the catchings of those years, except the oil taken in 1861. It appears further that she sailed from this port last fall to the Coast of California, and was whaling for a while in Scammon's Lagoon, where she caught some 280 barrels of oil, and while in said Lagoon she was stranded, and after exertions to recover her from her perilous situation, without success, the master put the vessel with the oil and other property on board at auction, and a sale was effected for the sum of \$8,800. She met with the accident on the first day of February, and these libellants continued their exertions in aid of the master until the sale, which was on the fifth day of the month. She struck about three-fourths of a mile from the shore, and as the wreck progressed she was moved nearer, so that most of the labor was performed within a cable's length of the shore. In performing this labor there was no danger, as there was no surf, and there was usually fine weather. There were several masters of ships

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with their officers and crews who rendered aid to the "Speedwell, namely: those of the ships "Nile," "Martha," "Cynthia," and "Charles W. Morgan," but without success in restoring her. The purchase of the vessel and property belonging to her was made by Capt. Fish, of the ship "Nile," with whom Capt. Cornell, of the ship "Martha," subsequently united. They repaired the ship and brought her to this port, where she now is, in possession of C. A. Williams & Co., to whom they sold her. They also took into their possession the oil, which amounted to 1,216 barrels.

The counsel for the libellants contend, as the voyage is abandoned, it is incumbent on the master to pay the libellants their lays or shares in all the oil and bone taken during the voyage, and that they have a lien on the ship and oil to secure that payment. None of the papers of the ship were produced in Court, but it was admitted that they shipped under the provisions of the articles used at New Bedford. By them the seaman engages to perform the whaling voyage specified, and he shall be entitled to the payment of his share of the net proceeds as soon after the return of the vessel to her home port as the oil and other products of the adventure can be sold, and the voyage made up. Under this stipulation the seaman can not claim his share to be measured off and delivered to him, even at home, after the voyage is complete. By the terms of the agreement, and by the maritime law, their interest is in the proceeds realized from the sale of the articles obtained, but the counsel contend that as the voyage is broken up by the wreck of the vessel, the contract has terminated, and they should be protected in their lien, where they can find the property. There is force in this position as a general principle of maritime law. But is it a case which comes within the equitable powers of the Court, to dispense with a fulfillment of the conditions of the contract, so far as the mode and time of payment is concerned? When a mariner ships as, in this case, he usually has an advance, and receives during the voyage certain advances for clothes, liberty money, etc., etc. This account is secured by a lien on the oil, and deducted from his share of the net proceeds of the voyage. It appears in this case that all the oil, except what was taken the last year, with all the bone,

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has been sent home, and doubtless has been sold, and awaits the termination of the voyage for settlement of the claims upon that fund. So far as the case is presented, the Court has not the means to make an adjudication in the matter. We do not know the amount of net proceeds of the oil and bone sent home, nor the indebtedness of the seamen. There are cases also when seamen are entitled to an additional amount to pay the expenses of their return home. It must be admitted that the master could not come to a settlement here, for the agreement is to pay what the products of the voyage will bring at home, which imposes upon the owner the cost of freight, and therefore it must decline in this class of cases to interfere in the settlement, unless it is proved to the Court that the only security for the seaman is his lien on the property within our jurisdiction. It is a principle of maritime law that this lien attaches to the ship and freight and proceeds, into whatever hands they may come, and takes priority of all other claims. (*Brown vs. Lull*, 2 Sumner, 443.) A sale by order of Court, under the law of foreign attachment, will not avoid this lien, but admiralty will still enforce it. It is true that he has no legal ownership in the oil, yet it is the source of the fund from which he is to be paid, and he has a lien upon it until sold by the owners, pursuant to the contract. Any other mode of sale cannot defeat his lien. Is it the duty of the master to settle with the crew, if he can make out their accounts, rather than leave them destitute in a foreign country, or compel them to resort to the Courts to enforce their lien on the property saved, and which, as in this instance, he has sold? He is fully authorized to do so on the principle that he is authorized to pay the wages of a merchant seaman, who is discharged abroad, either voluntarily or by necessity, having freight money in his hands.

It is contended that it will be the same as a total loss to the seamen to compel them to go to New Bedford to settle their voyage. This is not usually necessary, but if it was, it is in accordance with a well understood contract. A shipwreck works inconvenience and loss to all connected with a ship. The mariner understands this hazard as well as the owner, and each must take the consequences of it. Are the seamen who shipped at this port last fall in any different situation. Judge Bett says,

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in the case of Reed *vs.* Hussey, 1 Blatchford and Howland's Reports, 538, "that the Court may undoubtedly, in the exercise of its equitable powers, dispense with a literal fulfillment of the conditions of this description of engagements, and may regard acts which are substituted by agreement, express or implied between the parties, or which are compelled by the exigencies of the voyage to be equivalent to an exact compliance with the articles." (The "*Minerva*," 1 Hagg., 347; the "*George Home*," *Id.*, 376 ; Harder *vs.* Gordon, 2 Mason, 541.)

Has then such an exigency of the voyage arisen to justify a settlement? No product of their voyage has been sent home, and no indebtedness exists there. I am fully satisfied that the amount advanced is correctly stated. I think that justice requires that the settlement should be made here. The voyage is broken up, abandoned, and there is an end of the contract. In cases of shipwreck, seamen are entitled to recover their wages out of the proceeds of the wreck saved by them. This principle of law applies in this case, and gives rights in the proceeds of the wreck when sold ; if postponed, or the property sold would pass into other hands, loss of the wages would be probable. The master and owner cannot perform their contract. This is rendered impossible by a major force. This consideration has great force in all cases where seamen have lays or wages due, but especially in this case, as the contract was made here, and the oil taken is here. In this case the amount due is of trifling consequence. Still, whatever it may be, it should be paid, or an aliquot portion of the oil given, after retaining sufficient to pay the advances. It will not be contended that the seamen from the "*Speedwell*" are entitled to any consideration for their services in their attempts to save the vessel and property on board before the master abandoned the voyage any further than the property saved furnishes means for payment of their wages. Their exertions were due to the ship by virtue of their contract. They are bound to exert themselves to the utmost to save the vessel and cargo from peril.

In the case of the "*Neptune*," 1 Hagg., 236, Lord Stowell said: "The crew of a vessel cannot be salvors, for it is their duty to protect the ship through all perils, and whose entire possible service for this purpose is pledged to that extent." In the 10th

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of Peter's, 122, Mr. Justice Story, after adverting to this opinion of Lord Stowell, says, "that is must be admitted that, however harsh the rule may seem to be in its actual application to particular cases, it is well founded in public policy, and strikes at the root of those temptations which might otherwise exist to an alarming extent to induce pilots and others to abandon their proper duty that they might profit by the distress of the ship which they were bound to navigate." There has been a difference of opinion in cases of shipwreck, when property is secured by the exertions of the crew, whether the allowance of wages should be put upon the grounds of a qualified salvage, or fixed by the terms of the contract, but if the compensation for this qualified salvage is controlled by the contract, the distinction ceases to be of importance. When, however, the contract ceases to be binding on the seaman, he then may become a salvor, although the voyage has not been completed. His relation to the vessel must be dissolved, and he must be exonerated from further duties. This principle was recognized in the case of the "*Natchez*" by this Court, and the same doctrine is sustained in the case of the "*Blaireau*," 2 Cranch, 268; *Hobart vs. Drogan*, 14 Peter's, 122. '

It is further contended that they are entitled at least to salvage for their services in saving the vessel and property on board, after the sale by the master, and the delivery of the vessel to the purchasers, for there was nothing more for the seamen to do under their contract, as the voyage was abandoned by the master. It appears that Richard Cumings, M. Fayal and Frederick Burrmeister, and Joe Marias, rendered services in saving the vessel and cargo for twenty-two days, at the request of the purchasers. There seems to be no precise terms agreed upon. The men testify that if they saved the ship and oil they were to be paid well. It appears further that these men served on board of the vessel from Scammon's Lagoon to Lahaina, doing seamen's duty, so that they were in service from the 5th of February, the day of sale, till their arrival in Lahaina on the 10th of April. Payments were made at Lahaina of \$20 each, and a present to Burrmeister in addition, as he was regarded especially as an efficient man. And the purchasers say

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that the seamen were satisfied with this amount, and gave them a receipt in full.

Courts of Admiralty regard it as their duty to re-examine settlements of this character, and the question arises: What is an equitable compensation for the services rendered? It was hard and severe service for the twenty-two days. What they were doing the balance of the time does not appear, until they sailed, which was on the 9th of March. They were at work night and day, watch and watch, a portion of the time—six nights probably. Captain Cornell states that “these men came on board the ‘Martha’ and the others on the ‘Speedwell’ to the islands. I told them they might go in my vessel or in the ‘Speedwell’ and I would give them \$20, and I paid them that amount, and they expressed themselves satisfied.” He says that he promised them \$20, but cannot tell at what place the promise was made, whether at the lagoon or Turtle Bay. There is no evidence that it was made at the commencement of the work, and therefore it is not at all strange that a misunderstanding should arise. In the case of *Hussey vs. Fields et als.*, owners of the “Rambler” of Nantucket, Judge Sprague, the distinguished Judge of the District Court of the United States for the Massachusetts District, says, “that when a whaling voyage is broken up by a disaster in a foreign port, the master on request of the seamen is authorized to deliver to them their share of the oil on the spot, although by the shipping articles the distribution of the proceeds was to be made after the return to the home port.” When the oil is here in which the seaman is interested, and the advances made here, there is every reason that the settlement should be made here. It is especially desirable in all cases for parties to adjust their own differences, particularly where a small amount is involved. It is not singular, however, that this case should have been presented to the consideration of the Court. It involves some interesting questions of the rights of seamen to enforce their lien on the catchings, and on the property wrecked, after the contract is dissolved, and they are exonerated from any further duty by virtue of it, as well as for the value of their services after its termination. A still further question sometimes arises as to the liability of owners for extra wages, which involves the

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further question whether the damage to the vessel was so great as to make it necessary to break up the voyage and sell the wreck. The contract was mutual, and neither had any right to defeat it.

A settlement in the cases referred to can not be to the detriment of the owners. It relieves them from all care and responsibility in the shipment and sale, and final adjustment.

In this case the legal principle is of little consequence, but as the counsel have presented it to my consideration with so much care and ability, I felt it my duty to give these views upon it.

The libellants do not present a case of any particular merit for salvage services. They did not encounter exposure or peril. There are no circumstances in the case to enhance the value of the labor by reason of any extraordinary and hazardous exertions.

In view of all the circumstances of the case, of their advances at the port of Honolulu, and of the quantity of oil taken since last autumn, and saved in part by them, and of their labor in saving the vessel and property attached, the Court hereby decree that Cumings, Burrmeister, Joe Maria and Fayal shall be paid forty dollars each. The payments which they received are in full compensation for all their other services at Seaman's Lagoon, and as seamen on board the vessel to Lahaina. If either of them has not received \$20 for this service, he is entitled to it.

As to the claim of the other libellants, there is no evidence to support it.

Costs to the libellants.

Mr. Montgomery and Mr. Harris for libellants.

Mr. Bates for claimants.

May 11, 1861.

Green and Hackfeld, assignees of Waterhouse, v. Janion, Green & Co.

SUPREME COURT.

W. L. GREEN AND H. HACKFELD, ASSIGNEES OF J. T. WATERHOUSE, vs. R. C. JANION AND W. L. GREEN, CO-PARTNERS, TRADING AS JANION, GREEN & CO.

THE right of stoppage *in transitu* is properly exercised only upon goods which are in passage and are in the hands of some intermediate person between the vender and vendee in process, and for the purpose of delivery.

The right to *retain* possession of goods, is controlled by the Law governing the right of *lien*; but the right to *regain* possession, when parted with, is controlled by the Law of stoppage *in transitu*.

Where a party had given his promissory notes in payment for the purchase of goods, and the goods thereupon set apart in the vender's warehouse in a place hired by the vendee, and allotted for the reception of his goods: Held, that an absolute transfer, both of the property and possession took place, putting an end forever to the vender's lien; and that the Plaintiffs as assignees of the purchaser were entitled to the goods.

Justice ROBERTSON delivered the judgment of the Court as follows:

This is a controversy submitted to the decision of the Court, without the formality of a trial, under the provisions of Section 1,140 of the Civil Code. The following is the statement of facts as agreed upon by the parties:

The said firm of Janion, Green & Co. are large importing merchants in Honolulu, and at different times sold to said J. T. Waterhouse thirty-eight cases printed cottons, being portions of different parcels of English goods imported by them.

Previous to the sale of said cases, said Waterhouse had made an arrangement with said Janion, Green & Co., by which a certain space in their fire-proof store was set apart for goods purchased by said Waterhouse, in return for which accommodation he allotted a certain space in the cellar under Makee & Anthon's building, which he had the control of, to Janion, Green & Co.

The above named thirty-eight cases of goods, when selected and bought by Mr. Waterhouse, were put on the said space allotted to his goods within Janion, Green & Co.'s store, (the key and custody of which store remained exclusively with

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them.) Mr. Waterhouse having inspected said cases and being satisfied therewith, signed promissory notes, to Janion, Green & Co. for the amount thereof, payable at the dates agreed upon.

Waterhouse gave no receipts to Janion, Green & Co. for said goods when shifted in their store to the space so set apart for his goods, until he came to take them away out of said store ; but then, and not till then, he gave receipts for the delivery of such cases as he took away. The thirty-eight cases which form the subject matter of this reference still remain in the said store of Janion, Green & Co., on the space allotted to Mr. Waterhouse's goods, but no receipt has been given by him to Janion, Green & Co. therefor.

None of the promissory notes made by said Waterhouse to Janion, Green & Co. have been paid, although the major part are over due.

On the 8th day of May, 1861, Waterhouse executed a deed of assignment to said W. L. Green and H. Hackfeld, reciting his indebtedness in a large amount, which he declared himself unable to pay, in consideration whereof he thereby assigned all his estate, both real and personal, to said W. L. Green and H. Hackfeld, in trust, to sell the same for the liquidation of his liabilities to his several creditors, parties to the said assignment, and who thereby released him from the same, in consideration of such assignment ; the proceeds of said estate when sold to be distributed amongst his said creditors *pro rata*, after payment of costs and commissions.

A question has, consequently, arisen between the said Janion, Green & Co. and the assignees, whether or not the said Janion, Green & Co. are entitled to retain said thirty-eight cases, which are still in their store, under the circumstances above stated ; or whether the said thirty-eight cases, passed to the said assignees under the deed of assignment, for the solution of which said question this statement of facts is, by mutual consent of the parties, respectfully submitted to your Honors for adjudication, under Section 1,140 of the Civil Code.

It is understood that the assent of W. L. Green to the assignment is not to operate as a waiver of the alleged lien of Janion, Green & Co., inasmuch as their claim to such lien was stated

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to and understood by the creditors, including Mr. Hackfeld, before the execution of said assignment, and the question of lien left open.

Upon the foregoing facts, the plaintiffs, as assignees, claim to be entitled to the possession of the goods in question, on the ground that, on the 8th of May, those goods were in the actual possession of Mr. Waterhouse, and so passed to the plaintiffs by the assignment. This claim is resisted on the part of the defendants upon two grounds, viz : First, that the defendants had not parted with the actual possession of the goods at the time of the assignment, and the promissory notes given by Mr. Waterhouse for the price of the goods being then and now overdue and not paid, the defendants have a right to retain the possession of the goods until the price is paid or tendered ; secondly, that if the defendants had parted with the actual possession of the goods, they cannot, under the circumstances, be regarded as having come to the actual possession of Mr. Waterhouse, or as having reached their final destination, but are still subject to the exercise of the right of stoppage *in transitu* on the part of Janion, Green & Co., the purchaser having become insolvent. It is understood, in the decision of this controversy, that the rights of Janion, Green & Co., whatever they may be, are not to be affected by the assignment made by Mr. Waterhouse for the benefit of his creditors, but that the difference is to be regarded and settled as if the same had arisen with Mr. Waterhouse himself, and not with his assignees.

In our opinion the decision of this case is not to be controlled by the law of stoppage *in transitu*, but by the law governing the right of lien. The right of stoppage *in transitu* is properly exercised only upon goods which are in passage, and are in the hands of some intermediate person between the vender and the vendee, in process and for the purpose of delivery. (Story on Sales, Section 319 ; Parsons on Contracts, vol. 1, p. 476 ; Long on Sales, pp. 177, 178 ; Smith's Mer. Law, pp. 645, 646, 647 and note ; Parson's Mer. Law, p. 60.)

In order to the applicability of the law of stoppage *in transitu*, it is necessary that the goods shall have left the possession of the vender, and not yet have arrived at their final destination.

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or reached the possession of the vendee, but are in an intermediate position, where, in case of the vendee's insolvency, the vendor may stop the goods in their passage, and re-assume the possession of them. We are aware that in some adjudged cases, as reported, the right of stoppage *in transitu* seems to have been stated in broader terms; but, upon examination, we are inclined to attribute this to the inaccurate use of language, and a want of attention to the clear distinction which exists between the right to *retain* the possession, and the right to *regain* the possession of the goods.

In the inquiry as to whether or not the goods have reached the place to which, by the understanding between the parties, they were to be carried, the unknown or ulterior destination to be given to the goods at some future time, according to circumstances, does not form a matter for consideration, but only the place contemplated as the stopping place of the goods, for the present, and as far as regards the original contract of sale. (Story on Sales, Section 335.) Upon the facts of this case, as agreed to and stated by the parties, we must hold that on the 8th day of May, when the assignment was made by Mr. Waterhouse to the plaintiffs, the goods in question, having been placed, by mutual consent of the vender and vendee, upon that part of Janion & Green's store leased to Mr. Waterhouse, had reached their final destination so far as regards the contract of sale, and therefore the right of stoppage *in transitu* did not exist at that date. But we go farther, and say that the right of stoppage *in transitu* never existed in this case; and if Janion, Green & Co., at any time subsequent to the completion of the sale, ever had, or now have, any claim to control the goods, such claim results entirely from the right to enforce their lien for the price, as venders, by retaining the possession of the goods. From the time that the goods were placed in that part of the store rented by Mr. Waterhouse, they were either in his possession or in that of the venders; for they never were the subject of any intermediate possession.

The claim of the plaintiffs to have the goods now, depends upon the question whether or not the venders had voluntarily, and without fraud, parted with the possession to Mr. Waterhouse. Upon this point, as upon the former, we are clearly of

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opinion that the plaintiffs must prevail. The part of Janion & Green's store which was rented by Mr. Waterhouse, must be regarded, so far as this controversy is concerned, as his storehouse, just the same as if it had been a separate building and situated upon his own land, or on that of some third party. This cannot be doubted for a moment, especially in view of the fact, which was admitted by the defense during the argument, that Mr. Waterhouse, by the terms of his agreement, was at liberty to use that place not only for the storage of goods purchased from Janion, Green & Co., but also of goods purchased from other parties.

When Mr. Waterhouse agreed to purchase the goods in question, and, upon inspection, expressed himself satisfied therewith, and gave his promissory notes for the payment of the price, the contract of sale was complete, passing the property in the goods to him ; and, when placed in the part of the store allotted to the reception of his goods, these goods must be regarded as having been delivered into his warehouse, and the transaction amounted in law to an absolute transfer, both of the property and the possession, putting an end forever to the vender's lien.

The fact that Mr. Waterhouse appears to have been in the habit of giving warehouse receipts for goods purchased from Janion, Green & Co., upon the removal of such goods from the warehouse, cannot, in our opinion, affect the rights of the vendors and vendee in this case. The giving of such receipts had nothing to do with the contract of sale, or with the storing of goods for the vendee's use in the place contemplated by the parties, all of which was complete without the formality of receipts. There is no rule of law of which we are aware, nor is any usage of trade shown to exist, which makes it requisite to give receipts under like circumstances with the present ; and in the absence of an express understanding between the parties, that the goods were not to be regarded as delivered to Waterhouse, until he gave such receipts, we can only infer that they were given as a mere matter of convenience connected with the warehouse, and were not demandable as of right. To infer more than this, upon the facts as they appear, would be to assume that even after he had received the goods and paid for

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them, Mr. Waterhouse was not at liberty to remove them from one of his storehouses to another, without giving a receipt; when, on the contrary, it must be admitted that upon the acceptance of the promissory notes by the venders, Mr. Waterhouse had an immediate right to remove the goods, even from their storehouse, without tendering receipts.

Such being our view of the case, the rights of the parties are not affected by the vendee's insolvency, or by his failure to pay the promissory notes at maturity.

Our decision is, that the plaintiffs, as the assignees of the purchaser, are entitled to the possession of the goods.

C. C. Harris, Esq., for Plaintiffs.

Jno. Montgomery, Esq., for Defendants.

June 11th, 1861.

SUPREME COURT—IN BANCO.

—
JULY TERM, 1861.
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IRA RICHARDSON *vs.* THOS. HARDING.

A PUBLIC officer, acting in his official capacity as agent for the Government, is not personally liable on contracts negotiated by him within the line of his public duties.

ALLEN, C. J.

This is an action of assumpsit against the defendant for labor done and performed, and materials furnished at his request as Road Supervisor, to which defendant pleaded the general issue.

It appears in evidence that the plaintiff superintended the building of a bridge on Judd street, and paid for the labor, and furnished all the materials at a cost of \$758; that he also performed labor on the same street, and also on Lilia street, the exact amount of which was not fully proved.

It appeared in evidence that the defendant, as Road Supervisor, made and executed a contract for the erection of the bridge for the sum of \$400, and it appeared that the contract was signed by him as Road Supervisor; and he contended that

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as the bridge was built, and the labor on the road performed under an agreement with him as Road Supervisor, that this action could not be maintained. The law provides that the Minister of the Interior shall appoint a Road Supervisor in every taxation district, who shall have the direction of the public labor on roads, bridges, and and all public highways, and disburse all road taxes, and moneys appropriated by the Legislature for roads, highways and bridges, under the instruction of the Minister of the Interior, and to whom he is accountable. It is further provided that the Government shall pay to him the amount of road tax collected by the Tax Collector in his district, and shall furnish him a list of all the people who have not payed the tax in money. The Road Supervisor reports to the Minister of the Interior of his transactions.

It is contended that, as the defendant executed the contract in question by virtue of his office as Road Supervisor, and expressly in that capacity, and also that he employed the plaintiff on the roads in the same capacity, that he is not liable personally ; a material stipulation in the contract is as follows:

"The whole of the works are to be executed in a good and substantial manner. All materials, labor and cartage to be found by the contractor, and he is to leave the same in a faithful and workmanlike manner, which is to be examined by T. G. Harding, Road Supervisor, Oahu ; when upon his certificate that the works have been done to his satisfaction, to H. R. H. Minister of the Interior, the sum of four hundred dollars will be paid to the contractor within six months from the completion of the said bridge.

(Signed,)

"T. G. HARDING,

"Road Supervisor, Oahu.

"IRA RICHARDSON.

"Honolulu, 5th April, 1860."

It certainly can not be inferred from this provision that any personal liability was incurred, or that the plaintiff relied upon the Road Supervisor instead of the government. It was his clear duty to give his certificate, that the work had been done to his satisfaction, to the Minister of the Interior, and on which, as I understand the contract, he was entitled to receive \$400. I do not understand that the defendant ever refused to do so.

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In the case of *Macbeth vs. Holdiman*, 1 Term Rep. 172, Justice Buller says, "In any case when a man acts as an agent for the public, and treats in that capacity, there is no pretense that he is personally liable." On this contract he negotiates as Road Supervisor, and stipulates expressly that the amount is to be paid by the Minister of the Interior on his certificate. In *Hodgson vs. Dexter*, 1 Cranch 345, the Court say "that when a public agent acts in the line of his duty, and by legal authority, his contracts made on account of the government are public, not personal." There can be no question upon the law, as it exists, that if an agent makes a contract, and describes himself as such, he is not personally bound; and especially is this the case when agents act in behalf of government, for the reason that it is never to be presumed that a public agent intends to bind himself personally; and it is equally to be presumed that the party contracting with a government agent relies upon the faith and ability of the government as better than on individuals. It is equally clear also that an agent for individuals or the public may bind himself by an express engagement, and hence the inquiry always as to whom was the credit intended to be given—if to the principal, then there is no reason that the agent should be held. The principle is very clear, and universally adopted, that when an agent makes a contract on behalf of his principal and discloses his name, he is not personally liable. In this respect there is no difference between an agent for government and for an individual, the question in all cases is, to whom was the credit given? Can there be a question in this case as to whom it was given? The defendant was known as Road Supervisor, and contracted expressly in that character.

Suppose the defendant had left the country, or died insolvent, could the Government have justified itself by saying that the liability was exclusively on the Road Supervisor. We think not. The credit was given to the Government, and not to the defendant, and it belongs to it to see that the contract is fulfilled; while at the same time, if he thinks to give more faith to his contract by imparting his own credit, he can do so, and incur the responsibility.

In the case of *Struckfield & Little*, 1 Greenleaf's Rep. 231,

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the Court say, that "when a contract is entered into, or a deed executed in behalf of the Government by a duly authorized public agent, and the fact so appears, notwithstanding the agent may have affixed his own name and seal, it is the contract or deed of the Government, who alone is responsible." The same rule does not apply to the agent of a private person, for in that case the name and seal of the principal must be made to the deed—the name of the agent alone is not sufficient. In a word, the Court are of opinion that a public officer, or agent, is not responsible in his official capacity, although he may pledge his personal responsibility, and therefore become liable, or he may become liable when he exceeds his authority or assumes to act in cases where he had no power, or improperly interferes to prevent the party from obtaining satisfaction from the Government; so too when money is placed in the hands of an officer or agent, for the express purpose of enabling him to fulfill a particular contract, and he refuses to pay it over. But the case is not brought within these principles.

Let judgment be entered for the defendant with costs.

C. C. Harris, Esq., for plaintiff.

A. B. Bates, Esq., for defendant.

SUPREME COURT—IN EQUITY.

L. KEELIKOLANI vs. JAMES ROBINSON.

THE Court, sitting as a Court of Equity, will exercise a sound discretion in taking jurisdiction of a case cognizable at law, and having rightful jurisdiction for the purpose of discovery, would also give relief.

Where a defendant was called upon to account and pay over to the complainant a certain proportion of the receipts and profits of a certain wharf and premises, assigned to the said defendant by an agreement made with the ancestor of complainant, it was held on demurrer that the bill should allege that the respondent took possession of the premises in pursuance of his contract, and that he *used* the premises, deriving profits from their use; or else the complainant can not have a decree for an account of profits. Held, also, that the present possession of the premises by defendant must be alleged, otherwise the complainant can not have a decree of surrender of possession.

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A derivative title must be clearly and fully set forth to compel an answer from the respondent in possession.

A party can not controvert the title of the person from whom he holds an estate, and this principle applies to the title of the heir, when the lessor dies during the term.

When no time is specified in an agreement at which an account shall be made :
Held, on demurrer, that the bill should allege that a demand for an account has been made and refused.

The agreement showing that the parties to it should pay equal proportions for the repairs on the premises leased, and the assignee or lessee of the premises having made the repairs at his own expense, without obtaining proportional payment from the other party ; it was held that the application of the share of the receipts belonging to such party was properly made by the party incurring the expense of the repairs—in payment of what was due from the other party for his part of the cost of the repairs.

Such proportion of the cost of repairs regarded as an offset, if rents have been received.

Messrs. Bates and Montgomery, for defendant, having filed a demurrer, on the 28th of February last, to the bill filed in this suit, the points were argued before the Chief Justice on the 2d and 4th of March following, and on the 6th of that month the Chief Justice delivered his decision as follows :

This is a bill in Equity, in which it is alleged there was an agreement in writing between Kalaimoku and said defendant, in the following terms. viz :

“ Know all men by these presents that I, Kalaimoku, commonly called William Pitt, Esq., do hereby assign unto James Robinson, his heirs, executors, administrators and assigns, one half of the wharf, commonly called the King’s wharf, situated near the southwest angle of the Fort in Honolulu, extending in front one hundred yards or thereabouts, and running back one hundred yards or thereabouts, upon the following conditions : First—The said James Robinson doth hereby bind himself, his heirs, executors, administrators and assigns, to pay one half of all the expenses incurred in altering, repairing or improving the said wharf, and to pay to Kalaimoku, his heirs, executors, administrators and assigns, one half of all the moneys received for the use of such wharf and premises ; and I, Kalaimoku, do hereby agree to pay one half of all the expenses incurred in altering, repairing and improving the said wharf. And we do hereby bind ourselves, our heirs, executors, administrators and

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assigns, to fulfill the above agreement. Given under our respective hands and seals at Honolulu, this 11th day of January, in the year of Our Lord 1827.

(Signed)

[L. S.]

" KALAIMOKU,

[L. S.]

" JAMES ROBINSON."

The plaintiff claims by the agreement to receive one half of the proceeds of the premises, arising from the rents, wharfage, or use as a ship yard, after deducting one half of the expenses of altering, repairing, or improving said yard. That Kalaimoku died in 1829, leaving W. P. Leleiohoku, his son, his heir, who died in 1848, leaving an infant son his heir, John Pitt Kinau, who died in 1859, being still a minor, and that the plaintiff was the mother of John Pitt Kinau and his lawful heir; and the complainant avers that no account has been rendered of the net receipts and profits of said wharf and premises, and that a large sum is now due; that the agreement is no longer in force as against her, and that the entire use of the property is her's. Wherefore, the plaintiff prays that the defendant may be required to account and pay whatever amount may be due, and to surrender the use and occupation of the premises; and that such other things may be done in the premises as to truth and justice may appertain.

The defendant demurs, first on the ground of jurisdiction.

The Court, in the case of *Ewing and Miller vs. Janion*, (1 Haw. Rep., p. 66,) declares that on a bill of discovery in a matter of account filed in the Equity side of the Court, that the bill would be entertained notwithstanding the case was one cognizable at law; and the Equity Court having rightful jurisdiction for the purpose of discovery, would also give relief. The Court take the position that they will exercise in such cases a sound discretion in exercising jurisdiction. In the case of *Carlisle vs. Wilson*, (13 Vesey, 278, 279,) Chancellor Erskine says, "that it cannot be maintained that this Court will take jurisdiction, and grant relief only when no remedy can be had at law, the contrary is notorious." In this case, as appears by the agreement, it is peculiarly a case for the Equity side of the Court, for the assignment to the defendant was made of one half the wharf on condition that he should pay to Kalaimoku one half of all the moneys received for the use of such

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wharf and premises. Who can render an account but himself? and this he has agreed to do, and the case comes fully within the powers of a Court of Equity, and the presumption is strong that the adequate remedy could not be had in a Court of Law.

It is further assigned as a cause of demurrer, that it is not alleged in the bill that the defendant is or ever has been in possession of the premises. The plaintiff alleges an assignment of one half of the property, and that he agreed to account for the rents and profits, and that he has not done so, and therefore she calls upon him to account and to surrender the use and occupation of the premises; although the possession is not alleged in express terms, still it is sufficiently clear to enable the defendant to answer distinctly and intelligently. If he has not received rents he can so answer, if he has not been in occupancy, he can disclaim. The allegation is sufficient.

It is further assigned, as a cause of demurrer, that it is not alleged that the preliminary conditions of the agreement have been performed by the defendant or by those under whom she claims. This is a sound objection, if by the construction of the agreement, a condition precedent was imposed on the plaintiff. By the agreement it appears that each party agreed to pay one half of the expenses incurred in altering, repairing and improving said wharf—and the defendant agreed to pay one half of all the moneys received for the use of such wharf and premises to the party with whom he made the agreement, his heirs, executors, administrators and assigns. It is clear from the agreement that the defendant was to have possession and charge of the property, as he was to receive and account for the rents and profits—it is equally clear that he might have called upon Kalaimoku to have contributed his portion of the expenses of repairs, but if he did not, and delayed till the receipts were sufficient to liquidate it, they would be applied for that purpose, and thereby discharge that part of the obligation. Of all this the answer can give information. The agreement does not set forth who shall repair the wharf, but it does declare that each shall pay one half the expenses. If either party omitted to pay his proportion to the other who had made the repairs, the receipts would be properly applied to their payment. But I do not regard it in a matter of account, as a con-

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dition precedent, but rather in offset, if rents have been received.

It is further assigned that the bill does not allege any demand for an account of the alleged rents, profits or wharfage, or that this defendant refused to furnish such account. It is very evident that in law and equity a demand for an account under agreements of this nature should be made, and if denied in the answer must be proved. It is equitable that the party should have an opportunity to account, and pay, without a suit, and if no time is specified when this shall be done, it is reasonable that he should have notice, before being subjected to the annoyance and expense of a suit. It should be alleged in the bill that a demand has been made, and refused, and I regard this cause of demurrer as sound in law.

As a further cause of demurrer, it is alleged that the premises should have been described in the bill by metes and bounds. The defendant received the assignment of the property, described as the King's wharf, situated near the south-west angle of the fort in Honolulu, extending in front one hundred yards or thereabouts, and running back one hundred yards or thereabout. It is supposed that the parties understood clearly and distinctly the extent of the premises by the description, and they shall not dispute it, any more than the title, for it is a general rule that a tenant shall not dispute his landlord's title. Reasons undoubtedly may be given in the answer for an accurate survey, and a failure of title may be shown, as a defense, in not taking the charge of property, but the agreement is not defective on its face, and all that either party can claim, as between themselves, is that the agreement shall be carried out as written. Unless third parties have legally interfered to disturb the possession, the defendant will be liable for one-half the moneys received for the use of such wharf and premises. I do not regard it as a legal cause of demurrer, whatever force it may have by an answer, for there may be a state of facts which would vary the responsibility of the defendant, and render a survey of the premises actually occupied by him necessary; but this does not appear on the face of the bill.

My opinion upon the whole is, that the demurrers are not well taken, and therefore must be overruled, with the exception

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of the fifth, and as this objection is well founded, the demurrer must be allowed, unless the plaintiff moves to amend the bill. It is true that the bill is not carefully drawn, still its averments are clear and I think may be understood, so that the defendant will have no difficulty in framing a definite and complete answer.

C. C. Harris and R. G. Davis, Esqs., for complainant.

A. B. Bates and J. Montgomery, Esqs., for defendant.

The complainant's counsel, C. C. Harris, amended his bill, but the counsel for the defendant took an appeal generally to the full Court on the remaining points of the demurrer, which was argued on the 22d March last, and on the 13th of August instant the Court delivered judgment on the demurrer as follows:

ALLEN, C. J.

The Court have carefully considered the several causes of demurrer assigned by the respondent to the bill, and are of opinion that the bill upon principles of equity pleading is deficient in not alleging that the respondent entered into the possession of the premises in pursuance of the contract, and occupied the same at the time of filing the bill, deriving profits therefrom, and that it is further deficient in not setting forth distinctly the derivative title of the complainant, by virtue whereof she claims to have inherited the premises described in the contract. The remaining causes of demurrer are overruled.

The demurrer therefore is sustained for the foregoing causes, with leave to the party to amend the bill. The Court will only remark that they regard it as a settled principle of law that a party cannot controvert the title under which he holds an estate, and this principle applies also to the title of the heir, when the lessor dies during the term. There are exceptions to this general rule, as when the tenant was induced to accept possession from his lessee, say from a mistake, or when he has been deprived of possession derived from his lessor by one who has a paramount title, and some others. The question of heirship to the premises remains open. The Court are of opinion that the counsel have misapplied the general doctrine that a demurrer to a bill is sustainable when it is for possession of land, the remedy being, as they allege, ejectment at common law.

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This assumes the ground that there is a title to settle, but in this case the party is not permitted to question the title under which he holds by virtue of the contract. By the bill, the rights of the parties under the contract are in question, and not a title adverse to the complainant.

ROBERTSON, JUSTICE.

ON DEMURRER.—After careful examination and reflection, I concur in the opinion of the Chief Justice, that the demurrer must be sustained upon the two points indicated by him. I was at first inclined to give great weight to another point raised by the respondent, as to this being what is denominated in the books an ejection bill, and therefore not sustainable. But upon reflection, I regard that objection as unsound. It does not appear from the face of the bill that the title to the property is in dispute in this case.

But complainant's bill is clearly defective upon the two points, which are sustained by our present ruling. The title set up by the complainant is a derivative title, and it is not set forth with sufficient clearness and fullness to compel an answer from the respondent. While it is true that neither the respondent, if he took possession of the premises under the grant, nor any one claiming under him, could be permitted to dispute the title of the original grantor, Kalaimoku, yet the respondent may well dispute the right of any other party, claiming an account of profits under the contract, as upon a title derived from Kalaimoku. The complainant seeks no discovery as to her title. She knows what title she has got, and she should have alleged it distinctly and fully, showing the derivation of her title from Kalaimoku, through W. P. Leleiohoku and John Pitt Kinau in succession, stating in each instance whether the party inherited by will, or otherwise, the premises described in the original deed. The complainant has not alleged in her bill that either of the parties through whom she claims to have derived her title inherited the particular property in question, out of which she seeks an account of profits, and the Court cannot presume it.

The other objection is, that the complainant does not allege that the respondent ever took possession of, or improved and

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derived profit from the premises, or that he was in possession at the time the bill was filed. Unless it is alleged, and admitted or proven, that the respondent took possession of the premises in pursuance of his contract with Kalaimoku, and that he used the premises, deriving profits from their use, the complainant cannot have a decree for an account of profits. And unless it is alleged, and admitted or proven, that respondent is now in possession of the premises, how can the complainant have a decree requiring the respondent to surrender the possession to her?

It seems to me that if the Court should overrule the demurrer, and compel the respondent to answer the bill as it now stands, he might answer it in such a manner, keeping strictly within the rules of pleading, that had the cause gone to a hearing upon the bill and answer, the Court would have found it impossible to make a decree in favor of the complainant, by reason of the defectiveness of the pleadings, and would have been under the necessity of dismissing the bill.

There were two other points raised by counsel for the respondent, in support of the demurrer, upon which the Court does not find it necessary to give any opinion at present. Those points were, first, that Leleiohoku could not have inherited the premises in question from Kalaimoku, who is said to have died in the year 1829, because by the law of this Kingdom, at that time, Kalaimoku himself could not have had a title transmissible by inheritance. Secondly, that every person now claiming title to land in this Kingdom should set up a title founded upon either a Land Commission award, a Royal Patent, or the *Mahele* book of 1848. Should the complainant amend her bill so as to conform to the present ruling of the Court, the respondent will then have an opportunity, if he deems it proper, to press those two points upon the attention of the Court, in such way as counsel may think expedient.

August 13th, 1861.

In re Kamaha et als.

SUPREME COURT.

IN RE KAMAHA et als.

WHERE it appeared that the magistrate had competent jurisdiction to try and decide the case, the Court refused to inquire into the legality of the sentence on a writ of habeas corpus, further than as to the power to pass the particular sentence.

Whether a sufficient ground was laid in the information to authorize the Police Magistrate to issue a warrant of arrest outside of his own particular district, can not be inquired into, on a writ of habeas corpus, after conviction and judgment passed, though it might be on a commitment before trial.

Irregularities in the proceedings in the lower Court, should be availed of before judgment, or made the ground of an appeal.

In future, before allowing the writ (habeas corpus) to issue, in cases like the present, the Court will adopt the practice of granting a rule to show cause.

Before Justice ROBERTSON, at Chambers.

The petitioners, Kamaha and eight others, procured a writ of habeas corpus to be issued, by my order, upon a petition stating that they are unlawfully confined in the prison of Oahu, by the Marshal, Wm. C. Parke, Esq.

The return of the Marshal is to the effect that the petitioners were committed to prison on the 28th day of January last, in pursuance of orders of commitment from Wm. Ap Jones, Esq., Police and District Justice of Lahaina, which orders set forth that the petitioners had been convicted in said Justice's Court, of the offense of larceny of cattle, for which they were sentenced to imprisonment at hard labor for terms varying from nine months to three years.

At the hearing, counsel for the petitioners admitted the truth of the whole return, except that in regard to Kamaha and three others, who are said to have been convicted of two larcenies, and to have received sentence of extra punishment, under Sec. 16, Chap. 16, of the Penal Code, he offered to show by a certified copy of the record of proceedings before the Police Justice that this was not correct. The Court refused to permit any part of the record from the Police Court to be read for that purpose, except the transcript of the judgment. (See case of William Riley, 2 Pickering's Rep., p. 171.) That transcript

is now before me, and upon examination thereof I find it to correspond exactly with the orders of commitment, as returned by the Marshal.

The petitioners are in the position of parties who are imprisoned upon execution, after judgment by a Court of criminal jurisdiction, a Court too which is expressly charged with the enforcement of the law, for a violation of which the prisoners stand incarcerated. (See Act to prevent the Larceny of Animals, Civil Code, page 426.) Such being the case, the question now is, to what extent can a justice of this Court, sitting in chambers, upon a writ of habeas corpus, go behind the return, the truth of which is clear, for the purpose of inquiring into the alleged illegality of any part of the proceedings which led to the imprisonment of the petitioners.

The only statutory provision we have upon the subject is the 855th Section of the Civil Code, which reads as follows: "The several justices of the Supreme Court shall have power at Chambers, upon any sworn application made in writing, to issue writs of habeas corpus for inquiring into the cause of any alleged unlawful imprisonment or restraint, or of *ad testificandum*, and they may enlarge on bail persons rightfully confined, in all bailable cases." We are therefore without any statute, similar to the English and American statutes, for regulating our proceedings upon a writ of habeas corpus, and the exercise of this part of our judicial power has hitherto been left (wisely perhaps), by the Legislature, to the discretion of the Supreme Court, which has a supervisory control over all the Courts of inferior jurisdiction. But this discretion is not a wild or arbitrary discretion. It should be exercised not only with reference to the peculiar condition of this country, but with reference also to the laws and usages of other and more advanced countries. (Civil Code, Section 14.)

Several cases have, from time to time, been brought before the justices of the Supreme Court, on behalf of parties imprisoned under civil process, or restrained of their liberty without process; and cases have occurred of the analogous proceeding, by motion, where parties were imprisoned as fraudulent debtors. But we are as yet, I believe, without any precedent which can be cited as being in point in the present case. In the case

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of M. M. Webster (1 Hawaiian Rep., p. 56), who was committed for contempt by the Police Justice of Honolulu, Lee, C. J., refused to interfere on a writ of habeas corpus, as the commitment appeared to have been made by the Police Justice in a matter within his jurisdiction, and he had not exceeded his authority. In the report of this case mention is made of that of Laumia and Makaukau, who were convicted of adultery before the District Justice of Koolauloa, fined, and sentenced to imprisonment for non-payment of the fine, in which the Superior Court held that the Justice having had competent jurisdiction to try and decide the case, it could not inquire into the legality of the sentence, on a writ of habeas corpus, and that the parties must be left to their remedy by appeal. That case comes nearest to the present of any case which has come up in our Courts heretofore. In *Re Marion Landais* (1 Hawaiian Rep., p. 199) was a case depending upon international law and the comity of nations; while the cases of *De Flanchet* (2 Hawaiian Rep., p. 96) and *Charles Kauffman* (2 Hawaiian Rep., p. 313) were those of seamen arrested under peculiar treaty stipulations, and not under judicial process.

After having consulted such authorities, both English and American, as are within my reach, I am of the opinion that in a case like the present, any judge in England or the United States would feel bound to remand the petitioners, as a matter of course, after the return was put in, or, probably, upon a petition framed in accordance with the practice of the Courts of those countries, which would necessarily disclose the circumstances under which the petitioners are confined, the judge or Court applied to would refuse to issue a writ of habeas corpus, upon a rule to show cause.

By the Statute of Massachusetts upon this subject, it is declared that, "persons convicted, or in execution upon legal process, civil or criminal," shall not be entitled, as of right, to demand and prosecute the writ of habeas corpus. (Revised Statute of Mass., 1836, p. 655.) By the Statute of New York it is declared that, "persons committed or detained by virtue of the final judgment or decree of any competent tribunal of civil or criminal jurisdiction, or by virtue of any execution issued upon such judgment or decree," shall not be entitled to

prosecute such writ ; and that if it shall appear that the party is detained in custody, "by virtue of the final judgment or decree of any competent Court of civil or criminal jurisdiction, or of any execution issued upon such judgment or decree," he shall be remanded. (N. Y. Revised Stat., Vol. 2, pp. 797 and 801.) The provisions of both those statutes are based upon, and closely resemble, the English statutes on the same subject. (See Kent's Com., Vol. 1, pp. 642, 644, and Blackstone's Com., new ed., 1813, Vol. 3, p. 127.) The learned author of Kent's Commentaries says : "If the party be in custody by civil process from a competent power, he may be discharged when the jurisdiction has been exceeded, or the party has become entitled to his discharge, or the process was unduly issued, or was not legally authorized. But no inquiry is to be made into the legality of any process, judgment or decree, or the justice or propriety of the commitment in the case of persons detained under process of the United States, where the Court or officer has exclusive jurisdiction ; nor where the party is detained under the final decree or judgment of a competent Court ; nor where the commitment made by any Court, officer or body, according to law, is for a contempt, and duly charged. The remedy, if the case admits of one, is by *certiorari*, or writ of error." (See also Hill's Rep., Vol. 3, p. 664, notes.)

Bronson, J., in *The People vs. Cassels*, remarked, "A contempt was specially and plainly charged in the commitment, and it was the duty of the judge forthwith to remand the prisoner. The statute expressly forbids an inquiry into the justice or propriety of the commitment in such a case. If there had been no statute, it is clear upon principle, that the judgment or decision of any court or officer of competent jurisdiction cannot be reviewed on *habeas corpus*. If there has been error, the remedy is by *certiorari* or writ of error. When the return states the imprisonment to be by virtue of legal process, the officer may inquire whether in truth there be any process, and whether it appears upon its face to be valid ; and he may also inquire whether any cause has arisen since the commitment for putting an end to the imprisonment, as a pardon, reversal of the judgment, payment of the fine, and the like. But he can not rejudge the judgment of the committing Court or magis-

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trate." (5 Hill's Rep., p. 167, and cases there cited.) In the case of the King against John Suddis, (1 East's Rep., p. 306,) the Court of King's Bench seems to have held it "a sufficient return to a habeas corpus that the defendant is in custody under the sentence of a Court of competent jurisdiction to inquire of the offense, and to pass such a sentence, without setting forth the particular circumstances necessary to warrant such a sentence." (See also Commonwealth vs. Keeper of Debtor's Apartment, 1 Ashmead's Penn. Rep., 10; case of J. V. N. Yates, 4 John. Rep., 317; and Commonwealth vs. Lecky, 1 Watt's Rep., 68, referred to in Kent's Com., Vol. 1, p. 644. note c.)

From the general tenor of the authorities, both English and American, I am inclined to think that in a case like the present, of commitment after final judgment, even where the jurisdiction of the Court or magistrate is questioned, it is not usual for their Courts, in a proceeding upon habeas corpus, to inquire further than as to the jurisdiction of the offense, and the power to pass the particular sentence. In this case the jurisdiction of the justice is, to that extent, admitted. In the case of Johnson vs. United States (3 McLean's Rep., p. 89), an application was made for a rule to show cause why a writ of habeas corpus should not be issued to bring up the body of a party confined in the penitentiary, after sentence, for aiding and assisting in making counterfeit money. The indictment charged the offense to have been committed more than two years before the indictment was found, whereas the statute limited the prosecution of the offense to two years after its commission. The Court overruled the application, and said, "Where there is a want of jurisdiction apparent upon the record, the proceedings of a Court are not valid. But there is no want of jurisdiction in this case. The Court had jurisdiction of the offense, and if there was a bar under the statute, it should have been pleaded. No such plea was interposed, and the question is, whether the objection can be raised on a writ of habeas corpus. We suppose it cannot. By failing to set up the defense, the defendant waived it. And if this were not the legal effect of failing to set up the statute, it is clear that on the habeas corpus, the Court cannot look behind the sentence of the Court, where the jurisdiction is undoubted." (See also, *Ex parte Gill*, 7 East's Rep., p. 376.)

But the power of every Court which tries and condemns a party for a criminal offense, consists of several ingredients. Such power, if complete, includes jurisdiction both of the particular subject matter and of the person of the party accused. In the case of a commitment, after judgment, by the Supreme Court, or by either of the Circuit Courts, I would presume jurisdiction over the person; but I have doubts as to the propriety of extending that presumption to similar commitments, when made by the inferior Courts. It was sought to be argued that the magistrate had no jurisdiction in this particular case, because the offense was not committed within his district. But this objection is clearly unsound. The Police and District Justice of Lahaina has power to try a party accused of having committed an offense coming within his jurisdiction, in whatever district of the Kingdom the offense may have been committed, provided the party accused resides in the District of Lahaina, or for the time being is found there. (Civil Code, Secs. 893, 916.)

Counsel for petitioners offered to introduce oral testimony to show that the petitioners were not residents of the District of Lahaina, and that they were not arrested in that district, but on the Island of Molokai. The Court refused to hear such testimony, on the ground that it being apparent that the petitioners had been committed after final judgment, by a Court competent to try them for the offense of which they were accused, and it not being denied that they were produced before the magistrate at Lahaina, for trial, the Court, upon habeas corpus, should not go further. Upon reflection, I consider that ruling sound. If the petitioners were not residents of Lahaina, and were not found there when arrested, they might have raised that objection before the justice (unless they were arrested with a view to examination and commitment) and moved for their discharge, on the ground that the arrest was irregular, and if the justice had refused to discharge them, they could have excepted and appealed. But the petitioners appear to have waived that objection, and, in my opinion, they cannot raise it after conviction, upon a writ of habeas corpus.

It is said to have been declared by the Court, in the case of *Commonwealth vs. Lecky*, already referred to, (see Bacon's Ab.

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Tit., Habeas Corpus, p. 571,) that no imprisonment under process is regarded as unlawful, on habeas corpus, when the process is a sufficient justification to the officer. I find a similar doctrine stated in several authorities. In this case there can be no question that the orders of commitment under which the petitioners are detained in prison, are an ample justification to the Marshal.

One objection of great weight has been urged against the discharge of the petitioners, on habeas corpus, because of any alleged irregularity in the proceedings in the Court below, which, if it existed, should have been availed of before judgment, or made the ground of an appeal, and that is, that if the petitioners should be discharged on this proceeding, they could not be again arrested and tried for the same offense. In my opinion that is sound law, and if the petitioners should be put on trial again, they might successfully plead their former conviction, for their discharge on habeas corpus would not vacate the judgment now standing against them. That judgment could only be vacated, if at all, by pursuing a different form of remedy from this.

The petitioners being imprisoned on execution, after final judgment, by order of a Court of competent jurisdiction, to try and punish for the offense of which they were convicted, the motion for their discharge on habeas corpus seems to me to have no foundation, if we are to be guided by the rules which govern the Courts of other countries; and it will no doubt be found expedient to conform our practice generally to theirs. But as the practice of our Courts, in relation to this subject, is not yet clearly defined, and as the transcript of the record of proceedings from the Court below has been put in for the purpose of showing the judgment, I have looked further at that transcript to see if any irregularity was apparent upon its face. Upon examination, I have discovered something which seems to have escaped the notice of counsel, and was not adverted to at the argument. It appears that the warrant for the arrest of the petitioners was issued by the magistrate upon the sworn information of J. C. Farwell, accusing them of the crimes of larceny, and receiving stolen property. When the prisoners were brought before the Court, Mr. Bond, the District Attor-

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ney for Maui, who appeared to prosecute on behalf of the Crown, charged them with larceny of cattle of the value of eighty dollars, and also with receiving stolen goods. Now, as the jurisdiction of the Police and District Justice of Lahaina is co-extensive, for the purpose of examination and commitment for alleged offenses, within the limits of the judicial circuit in which he resides (Civil Code, Sec. 893), and therefore extends to the Island of Molokai, it seems to me that in this case it was his duty, upon application, to grant a warrant of arrest against these parties, unless it appeared to him from the terms of the sworn information, that the prisoners were only charged with a crime or crimes coming within the jurisdiction of the District Justice of Molokai to try, and to pass sentence for. If the petitioners were charged with crimes of such magnitude that it appeared probable they would have to be committed for trial before the Circuit Court, then it was the duty of the Police Justice of Lahaina to issue a warrant for their arrest in any part of the second judicial circuit; and if, after examination, it should appear that the offense of the prisoners came within his jurisdiction to try, and to punish, it would be his duty to proceed to judgment in the case, and not to discharge them.

A discharge under these circumstances could not benefit the parties accused, because they would be liable to be re-arrested, *instanter*, for trial. The several Police Justices, in the exercise of the power conferred upon them by statute, for the arrest, examination, and commitment of parties charged with crimes, must be allowed a reasonable discretion, and the question whether or not sufficient ground was laid in the information, in any case, to authorize the Justice to issue a warrant for the arrest of the party accused, outside of the Justice's own particular district, cannot certainly be inquired into upon a writ of habeas corpus, after conviction and judgment passed, although it might be on a commitment before trial; but even in that case the Court would not look beyond the sworn information upon which the Magistrate had acted. When the petitioners were arraigned before the Police Justice, they were charged with larceny of cattle to the value of eighty dollars, and also with receiving stolen goods, the value of which was not specified. It was therefore uncertain at that time whether

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or not the petitioners would be proved to have received stolen goods to the value of twenty dollars, in which case the offense would have been beyond the Justice's jurisdiction to punish, and he would have had to commit the petitioners for trial before the Circuit Court. (Penal Code, chap. 53.) It is impossible that parties laying information of crimes, or that prosecuting officers should always be able to specify, precisely, the degree of crime with which the party should be charged, where that degree is measured by a pecuniary standard. It is not reasonable or necessary that they should be required to do so in a Court where no formal indictment is required. The assumption of jurisdiction by the Magistrate, for the purpose of issuing process, whether with a view to examination and commitment, or with a view to trial and sentence, must be regulated by his discretion, having due regard to the nature of the charge preferred before him by sworn information.

I have already stated that, in my opinion, the rules applicable to proceedings upon habeas corpus require me to dismiss the application for the discharge of the petitioners, and I may add that the proceedings below appear to me to have been entirely regular, so that this application seems to have no basis whatever. If any application should be made to me hereafter for a writ of habeas corpus, in a case like the present, I shall require a petition more formal and specific than the one presented in this case, and I shall adopt the practice which prevails elsewhere, of granting a rule to show cause, before allowing the writ to issue.

The motion is refused, with costs, and the prisoners remanded into the custody of the Marshal.

Mr. Harris for the prisoners.

Mr. Bates for the Crown.

September 10, 1861.

Henry Purdy *v.* Robert C. Janion.

SUPREME COURT—IN BANCO.

OCTOBER TERM, 1861.

HENRY PURDY *vs.* ROBERT C. JANION.

THE Circuit Courts of the Kingdom regarded, to a considerable extent, as Courts of national as well as of local jurisdiction.

By the concluding portion of the 880th Section of the Civil Code, held, they have the power to hear and determine private actions arising within their geographical jurisdiction, where the nature of such action is not otherwise controlled by law, whether the parties be residents of the circuits or of some foreign country.

The restriction as to the jurisdiction over the parties litigant, prescribed by the Code for the District Courts, not extended to the Circuit Courts in cases like the present.

Notice of the suit brought home to the agent, doing business in this country, regarded quite as effectual as if served upon the non-resident defendant personally, in accordance with the provisions of Sec. 1102, Civil Code.

On appeal from the Circuit Court for the Island of Hawaii.

The Court, per ROBERTSON, Justice :

The plaintiff commenced an action of trespass against the defendant, at the last September Term of the Circuit Court of Hawaii, claiming to recover damages for losses and injuries sustained through the alleged unlawful acts of the defendant, in capturing, and in otherwise interfering with certain cattle running near Waimea, on the Island of Hawaii, alleged to be the property of the plaintiff.

The defendant is not at present residing in this Kingdom, and service of process was made upon Mr. Wm. L. Green, of Honolulu, who is the acknowledged agent in this country for the transaction of the defendant's business. His counsel filed a plea of not guilty, reserving the right to move the Court to dismiss the suit, on the ground of a want of jurisdiction. After plea filed, defendant made an application before the first Associate Justice of the Supreme Court, at Honolulu, for a change of *venue* from the Hawaii circuit to the Island of Oahu, which application was refused.

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When the cause came on before the Circuit Court, defendant's counsel moved to dismiss, on the ground of the want of jurisdiction, and also for want of due and proper service. The motion was overruled, and the following exceptions were filed on behalf of the defendant, viz :

"First : That the said (Circuit) Court ruled that it had jurisdiction to try and determine this cause, on service of summons and complaint on the agent of the defendant at Honolulu, on the Island of Oahu, although the defendant was a non-resident of said Island of Hawaii, but the plaintiff residing on, and the cause of action having arisen on, the said Island of Hawaii, whereas the defendant alleges that the Court ought to have ruled contrary.

"Second : That the said Court ruled that the defendant was properly in Court, by service of complaint and summons on his agent in Honolulu, Oahu, although it was in proof by affidavit, and not contravened on the part of the plaintiff, that the defendant had resided in England since the year 1851, and had no domicil in this Kingdom, whereas the defendant alleges that the Court ought to have ruled the contrary."

These exceptions have now been discussed before this Court, the defendant's counsel arguing both the grounds raised by him at great length, and with much ingenuity and force, giving to the argument, however, a wider range than, in our view, the subject requires.

The decision of the first point, namely, as to the jurisdiction of the Circuit Court, and its power to entertain this suit, depends upon the construction to be given to a part of the 880th Section of the Civil Code, which reads as follows :

"The respective Circuit Courts shall have original jurisdiction to hear and determine all civil suits between individuals, or in which the Government is plaintiff, involving a greater amount of indebtedness or claim than one hundred dollars, and appellate jurisdiction in all such suits when the amount claimed does not exceed one hundred dollars. They shall have power to hear and determine all private actions arising within their jurisdiction, sounding in consequential injury or damages, without limit as to amount of claim."

The present action is one of the class of cases contemplated

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by the second clause of the passage just quoted. It is a private action arising within the geographical jurisdiction of the Circuit Court of Hawaii, sounding in consequential injury or damages. And such being the case, the Circuit Court has power, in our opinion, to hear and determine the cause, whether the defendant is a resident of Hawaii, or of some other circuit of the Kingdom, or in some foreign country; and whether the plaintiff is a resident of Hawaii or of some other circuit. In this case the plaintiff is a resident of the circuit in which the cause of action arose, and may well institute his suit there, subject, of course, to a change of *venue* for proper cause.

It is contended that the Circuit Courts are Courts of inferior and of merely local jurisdiction, and that, in the absence of an express provision in the statute to that effect, no Circuit Court has jurisdiction in such a case as this, unless the defendant is a resident of the particular circuit in which the action is commenced. It is true that the Circuit Courts, in their relation to the Supreme Court, are inferior, and to some extent limited, in their jurisdiction. But upon a careful examination of the statutes defining the powers of the Circuit Courts, it will be seen that they are to a considerable extent Courts of national as well as of local jurisdiction. And we cannot regard as sound the position assumed by the learned counsel for the defendant. The language of the statute now before us is plain and unequivocal, and makes the fact that an action arises within the geographical limits of any particular circuit, the sole and conclusive ground of jurisdiction in the Circuit Court of that circuit, over this class of cases. The restriction prescribed by another part of the Civil Code, touching the power of the District Courts, which makes it necessary that the defendant in any civil suit, brought before either of them, shall be a resident, or for the time being shall be found within the district where the suit is commenced, is not extended by the Code to the Circuit Courts, so as to limit their power, at least in cases like the present. But we are not prepared at present to give a positive opinion as to whether or not that limitation should be held to apply to cases contemplated by the first clause of the passage quoted from Section 880.

The second ground of exception, touching the service of

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process upon the defendant, is governed by Sections 1,102 and 1,103 of the Civil Code, upon a careful consideration of which we regard the exception as unsound. In our opinion, the present case does not, as is contended on behalf of the defendant, come within the purview of Section 1,103, which applies only to cases in which the defendant never was an inhabitant of the Kingdom, but has property here ; or, having once resided in the Kingdom, has removed therefrom, leaving no agent here upon whom service can be made under the provisions of Section 1,102 ; in either of which cases statutory service may be made by publication of the summons. In construing this statute both of these sections must be taken together, and when thus considered they clearly show, in our opinion, the intention of the Legislature to have been in accordance with the view now adopted. It cannot be supposed for a moment that, in cases like the present, where the defendant, although he has ceased to be an inhabitant of the Kingdom, is still carrying on active business here through an acknowledged and well known agent, the Legislature intended that service should be made by publication, or by sending a copy of the petition and summons to the defendant abroad. In such a case notice of the suit brought home to the agent is quite as effectual, and probably better for every useful purpose than if served upon the non-resident defendant personally.

In the course of the argument on the exceptions, it was contended on behalf of the plaintiff, that the defendant, by moving one of the Justices of this Court for a change of *venue*, had acknowledged himself to be properly in Court, and had waived all right to object to the manner of the service, or its insufficiency. We regard this objection as perfectly sound, and would feel compelled to overrule the second exception upon that ground alone. But, for the sake of throwing light upon the subject, for guidance in future cases, we deem it best to base our decision against the exception, upon its own intrinsic unsoundness in law, according to our understanding of the statute involved.

The exceptions are overruled, with costs.

C. C. Harris, Esq., for plaintiff.

J. Montgomery, Esq., for defendant.

November 27, 1861.

Thos. King v. E. B. Huntley.

SUPREME COURT.

THOS. KING vs. E. B. HUNTLEY.—WRIT OF NE EXEAT REGNO.

A PARTY having been arrested as an absconding debtor, under Section 953 of the Civil Code, and affidavits having been filed both by the defendant and plaintiff, embracing counter allegations, as to the validity of the claim, the Court proceeded to hear evidence in order that it might judge whether, *prima facie*, there was any indebtedness to the plaintiff by the party arrested.

When the writ of *ne exeat regno* is prayed for against a departing debtor, it is not necessary to allege that the defendant is going abroad to avoid payment of the debt, but sufficient to allege that the debtor is about to quit the Kingdom, without leaving any provision for the payment of the debt.

By a strict construction of the terms of the Statute, if he secretes his property, or transfers it to third parties, or is making an effort to remove it out of the jurisdiction, or if the debtor is about to quit the Kingdom, it is a seeking to avoid the payment of the debt, and the Court is empowered by proof of either of these acts to order the arrest and detention of a debtor, and may at its discretion, on the examination of the circumstances of each case, decide whether it is reasonable that security should be given to abide the result of a suit, and pay the amount of such judgment as may be rendered.

The Court will examine, if the party arrested desires it, into the merits of the case, in order that he may not be detained on a groundless claim and for a malicious purpose. Upon such examination the Court will ascertain whether the rights of a party are endangered by his debtor leaving the Kingdom; and if they are, the process of arrest is legitimate and proper.

The Passport Law sustains the above construction of the Statute. (Article 41, Civil Code.)

The writ is a writ of right when the provisions of the Statute are complied with.

ALLEN, C. J.

The plaintiff brought an action against the defendant, claiming of him the amount of a promissory note, bearing date the 2d day of November last past, with interest, which he alleges the defendant executed and delivered to him, and that although often requested, he had refused and neglected to pay; and the plaintiff, on oath, further averred that the said defendant was about to quit the Kingdom, having made no provision for the payment of said note. Whereupon the plaintiff prayed that the process of arrest and detention might issue against said

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defendant, and that he might be detained until he gave bonds to abide the result of this suit, which was allowed. The defendant was thereupon arrested and held in custody, and now comes into Court and moves that the attachment be dissolved, and that he may be discharged from custody. He files an affidavit, in which he avers that he is about to leave the Kingdom, for a few months, in the exercise of his regular business as whalerman, for which purpose he proposes to proceed to the Coast of California in the schooner "Emma Rooke," of which he is first officer ; that he expects to return in the Spring next ensuing, when he intends to pay all legal claims against him ; that he has no intention to avoid or evade his debts. He further alleges that the plaintiff has the control of all the catchings of oil made by the schooner "Maria" during last winter, and in which the defendant has an interest, and which he is informed and believes to be amply sufficient to pay all the legal claims which the plaintiff holds against him. The defendant further alleges, that the plaintiff has not instituted this suit for the purpose of recovering the debt, as set forth in his complaint, but to prevent him from prosecuting his intended voyage, in which he will compete with the whaleship "Harmony," owned by the plaintiff, and in which the plaintiff solicited the defendant to ship for said voyage.

The plaintiff files an affidavit, in which he avers that he has not sufficient means of defendant's in his hands to pay the demands he has against him, and that the defendant has never made such claim previous to this suit, and that he never solicited defendant to ship on board the "Harmony." He further avers that the defendant has no ties in this country to induce his return, that he is aware of.

Evidence was adduced, showing the amount of disbursements of the schooner "Maria" for the whaling voyage to the Coast of California, as referred to in the defendant's affidavit, and also of the receipts from the sale of certain articles belonging to the adventure, and returned in the vessel, and the probable result of the shipment of the oil taken by the schooner "Maria," made to Bremen. Mr. Hackfeld testifies that the oil had been sold in advance of arrival. It appeared further that there were certain other articles of some value remaining unsold. As there

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were counter allegations in relation to the validity of the claim, the Court desired to hear evidence, so far at least as to be able to judge whether there was an indebtedness. Both parties introduced such evidence as they thought proper, and it appears, from the accounts stated and the evidence adduced, that the defendant is justly indebted to an amount about equal to that of the note declared on. The Court will take this occasion to say that this amount is not in the nature of an adjudication, for, when the parties present their case to a Court and jury, these proceedings can have no influence or relation, but it became necessary to know whether the plaintiff could make out a *prima facie* case. The Court will further state that the defendant did not present evidence in relation to some material items of the account to which he objected.

In support of the motion, the counsel for the defendant contends, 1st. That the complaint was insufficient in not alleging that the debt was due and unpaid.

The plaintiff follows the form prescribed by statute—he claims of defendant a certain sum of money, according to defendant's note, setting it forth in detail. I understand this claim to be of the amount of the note due and unpaid, and that although often requested to pay the same, he has refused and neglected so to do. The counsel contends it is sufficient for a declaration, but not for an arrest. Under the statute, the party filing a complaint, and before process can issue upon it, must make oath to its truth, that he claims a certain amount according to the tenor of a certain instrument. Is not the oath a mockery, unless the construction obtains that the amount as set forth in the note or contract he claims as due and owing him? The form being prescribed by the statute, must be regarded by the Court, and so far as precedents have been consulted, they sustain this construction.

It is further contended that it is not alleged that the defendant is about to leave the Kingdom with the fraudulent intent to evade the payment of the debt, and that an intended departure to a foreign country in pursuit of one's legitimate business does not subject one to the liabilities of the statute, and that it must be with the intent to defraud. In the case of *Taubuson vs. Harrison*, (8 Vesey, 32,) it appeared that the plaintiff, an ex-

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ecutor, moved that a writ of *ne exeat regno* might issue, to restrain the defendant, his co-executor, from quitting the Kingdom. The affidavit stated that the defendant was the captain of a ship trading to the Island of Barbadoes, and that he had collected a great part of the property as co-executor ; that he is going abroad, and the debt will be wholly lost or greatly endangered. Lord Chancellor Eldon expressed some doubts whether the affidavit was sufficient, not alleging that he was going abroad to avoid the demand. His Lordship observed, "that this is a high prerogative writ, and is applied to cases of private right, always with great caution and jealousy, and that in this instance the defendant was only going abroad in the exercise of his usual business," but upon the examination of the precedents, it was found that since the time of Lord Hardwick it had been sufficient if the affidavit alleges that the debt will be in danger of being lost, and the Court ruled that it was not necessary to allege that the purpose of going abroad was to avoid the demand, and made the order.

In this case the allegation is that the defendant is about to quit the Kingdom, having made no provision for the payment of said note. Every country has its own peculiar legislation for the collection of debts and the arrest of debtors for non payment. In the case referred to, Lord Eldon, after examination, did not regard it a sufficient answer that the defendant was going abroad in the exercise of his usual business. It is apparent that a debt is in more jeopardy, if the debtor goes abroad leaving no property, than if he remains at home in his regular pursuits. At a period in the history of English jurisprudence the writ of *ne exeat regno* was regarded as a high prerogative writ, and was issued with greater caution than at present, and this for many reasons—at that time an arrest and imprisonment for the non-payment of a debt, without assigning any special reason, was legal. Our statute is far more liberal, and prevents this, unless the party can prove certain acts on the part of the debtor, so that under the more liberal legislation of the present day this is as much a writ of right as any other, when the conditions of the statute are complied with. It is the ordinary process of Courts of Equity. The statute under which this arrest is made prescribes that it shall be law-

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ful for the Court to order the arrest of a debtor upon a complaint verified and duly filed that the defendant has contracted a debt in a fraudulent manner, or seeks to evade the payment of any debt or any other liability due to such plaintiff by secret- ing his property, or by transferring, or intending to transfer the same to any third party, or is about to remove the same out of the jurisdiction of such Court, or is about to quit the Kingdom. The statute very clearly regards, in a strict construction of its terms, that if one secretes his property or transfers it to third parties, or is making an effort to remove it out of the jurisdiction, or if the debtor is about to quit the Kingdom, that it is a seeking to evade the payment of the debt, and the Court is empowered by proof of either of these acts to order the arrest and detention of a debtor. It is not an imperative duty—the Court has the discretion, on the examination of the circumstances of each case, to decide whether it is reasonable that security should be given to abide the result of a suit, and pay the amount of such judgment as may be rendered. The Court will carefully examine, if the person arrested desires it, into the merits of the case, so that he may not be detained on a groundless claim, and for a malicious purpose. There would not be the same reason for arresting a merchant in full business, and in good credit, who proposes to go to San Francisco to replenish his stock, as there is for arresting a person who leaves the Kingdom without leaving any property to respond to a judgment which may be recorded against him. The examination of a case will enable the Court to judge whether the rights of a party are endangered by his debtor leaving the Kingdom, and if they are, this is a proper and legitimate process. The object and intent of the law is very clear that the subjects and residents of the Kingdom shall not be compelled to send abroad to collect their debts contracted here, and especially in the instance of those men whose pursuits attract them from one country to another. In this case each party is sanguine of the justice of his position, and each has a right to a trial by jury, and while the defendant insists on this mode of settling the controversy, he should not absent himself without leaving property or security so that if a judgment is obtained against him there will be means of

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satisfying it. It would be doing injustice to creditors here not to afford them at least this redress. Under our laws a very great liberty is extended to debtors, but it should be limited to the boundaries of the Kingdom. It would be virtually a denial of justice to compel our people to seek redress in foreign countries. Here the debt is contracted, here the testimony is, and here is the administration of the law under which the contract was made—and would it not be a virtual denial of justice to compel our people to go to a foreign country to employ counsel, take out commissions to take testimony, and inform the Courts abroad of the laws under which the contract was made, and submit their case to a foreign tribunal? The passport law sustains this construction. It is not an oppressive case for the defendant to give the necessary security; if he is right in his view of the accounts his sureties will have nothing to pay—if he is wrong he should pay whatever balance is due. The plaintiff has given a bond to indemnify him from all injury and damage arising from the arrest, if he does not sustain his suit. The Court sees no foundation for the allegation that the plaintiff has instituted this suit to prevent the defendant from prosecuting his intended voyage to the coast of California. His management of the business, especially after the arrival of the “Maria,” and her catchings of oil, has been especially regardful of the interest of his associates. By the terms of the contract, it was not incumbent on him to pay the debts incurred in the enterprise, such as seamen’s lays, etc., etc., the oil might have been sold, and if there was a sacrifice, the parties must equally bear it. Instead of resorting to this summary process, the plaintiff paid all the debts and shipped the oil to Bremen, expecting a better price than this market offered, all which would be for their mutual benefit. His offers to take the property remaining unsold are certainly fair and liberal. In view of all the circumstances of the case, I can see no reason for this harsh allegation against the plaintiff.

Motion overruled.

Mr. Harris, for plaintiff.

Mr. Montgomery, for defendant.

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SUPREME COURT—IN ADMIRALTY.

ISAAC AIKAKE *et als.* vs. SHIP "HIBERNIA."

IT IS THE duty of seamen to render all the aid in their power to the ship in distress; but where the ship, after being taken into port, was found to be so much injured as to be rendered unseaworthy, so that material repairs were necessary, held that the seamen were entitled to a reasonable compensation beyond their ordinary wages, for labor done in repairing and in the necessary preparation for repairs, such as unlading and restowing the cargo on board, at the port where the repairs were made.

No discrimination, in this respect, between seamen engaged in the whaling service and those in the merchant service.

Duty of owners to keep the ship in a seaworthy condition, and when she ceases to be so, they must incur the expense of repairs and not impose it on the seamen.

The principle that it was not customary to pay for the extra labor of the seamen in repairing the ship, unless she was insured, regarded as unsound.

To make a statute forfeiture of wages, on account of desertion, under the Laws of the United States, it is indispensable that the Log Book should contain an entry of the name of the seaman on the day when the absence takes place, and that he is absent without leave.

ALLEN C. J.

This is a suit by libel against the ship "Hibernia," for work and labor done in repairing said vessel at Hongkong.

It appears that libellants shipped on said vessel for a whaling voyage, at this port, in November last, and that soon thereafter the said voyage was commenced, and on their passage the ship met with a severe disaster at the Island of Ascension. The ship was aground about eighteen hours, and after severe labor she was put afloat. The accident occurred on the 8th of February, and the ship sailed on the 13th for Guam and Hongkong, and arrived at the latter place on the 10th of March. She required pumping most of the time, and Captain Bumpus, who was then mate, but subsequently master, testifies that, in his opinion, if there had been bad weather, the ship would have sunk. Immediately on arrival the ship was discharged, hove out, repaired, caulked on the bottom and coppered throughout, all of which was completed on the 3d of May, and on the 5th she sailed on her whaling voyage. Captain Bumpus testifies

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that the Hawaiian crew, including the present libellants, labored on the ship all the time except two days ; that the labor was severe all the time. It became necessary to discharge the cargo, which consisted of about 800 barrels of oil taken the previous season, and in which these parties had no interest, on board a store ship. He says he heard Capt. Edwards say he should pay the Hawaiians \$1 per day and the boatsteerers \$2 per day. Mr. Hyde was on board the ship, as he says, in various capacities, but last in that of purser, and he testifies to the same declaration of the Captain. It is in proof that the labor of the Hawaiians is far more valuable than that of the common laborers of China, for such service as was required on the ship ; and Capt. Sayers, of the whaleship "Republik," is of opinion that it is worth from seventy-five cents to one dollar per day ; that these men being accustomed to the duties of the ship would be worth from two to three times as much as the Chinamen.

The counsel contended that it was the duty of the seamen as co-partners, to stand by the ship in distress. (*Coffin vs. Jenkins*, 3 Story, 108.)

The seamen in this case were not co-partners, neither had they the slightest interest in the cargo of oil, still it was their duty to render all the aid in their power to the ship in distress, as they did at the Island of Ascension, and on the passage to Hongkong, but for labor done in repairing, and in the necessary preparation for repairs at the port where they were made, I am of opinion that it is sound upon every principle of maritime usage, that a reasonable compensation should be paid them. In the case of the "Philomela" (1 Hawaiian Rep., p. 105), it was decided that the expenses of wages and provisions during a delay and going out of the course of the voyage to refit are to be contributed for in general average. These expenses are classed among the general average losses. This may be considered the American doctrine, recognized in this country, as applicable to the merchant service, but only in degree to the whaling service. (*Abbott on Shipping*, 498 and note ; 3 Sumner, 27 ; 3 Sumner, 400.)

The seamen on a whaling voyage are employed for a certain proportion of the oil and bone which may be taken, whereas

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the merchant seamen are employed by the month, no matter what the amount of freight may be which may be earned ; in each case it is the duty of the owners to have their vessels in seaworthy condition when they embark, and, if she meets with disaster, it is the duty of the seamen to render all the aid in their power to restore her from danger and injury, and no pay is claimed by libellants till the port of repairs is reached, and the labor necessary for her repairs is commenced. I desire to be explicitly understood as not including within this principle any claim of payment for the ordinary repairs on shipboard, nor for labor in getting the ship into port ; but in cases similar to the present, where the ship has been so injured as to be rendered unseaworthy, so that material repairs are necessary and she is substantially and permanently benefited. The only interest the libellants had in the vessel was her use, for a few months, the ensuing whaling season. By the shipping articles the engagement terminated in November, and she arrived at this port on the 2d. Their labor contributed to permanent repairs, not for the present voyage only. Repairing garboard streak, caulking the hull, and coppering throughout, as in the present case, were permanent repairs, in which the owners were largely interested, and the seamen only for a few months. In addition they performed severe labor at the Island of Ascension, and in working the ship to Hongkong. In view of these considerations, and of the express promise of the Captain, who, from his long experience, has a very good knowledge of the rights of the ship as well as of the seamen, and of the value of their labor at the place of repairs, I am of opinion that they are entitled to be paid. The monthly wages of the seamen in the merchant service would be continued, and I can see no reason of the discrimination against those in the whaling service, to the whole amount of their labor. It is the duty of the owners to a greater extent than I have commented upon, to keep the ship in seaworthy condition, and when she ceases to be so, they must incur the expense of repairs, and not impose it on the seamen. Against this contingency insurance can be effected by them. In this case, however, it is in evidence by one of the Hawaiians that the Captain, before the work began, promised them \$1 per day for their labor on the repairs, which is con-

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firmed by Capt. Bumpus and Mr. Hyde, who testified that they heard the Captain say that he should pay the foremast men \$1 per day, and \$2 to the boatsteerers. I regard this agreement on the part of the Captain as obligatory. Some testimony has been adduced to show that it is not the custom to pay for labor performed by seamen under these circumstances, unless the vessel is insured. I cannot recognize any such distinction for a moment. The men are either entitled to pay for their labor, or they are not, and are not at all dependent upon whom the ultimate responsibility of the payment rests. Be this as it may, no evidence is adduced that the vessel was insured, and therefore the defense is not sustained even upon this principle, which I regard clearly as unsound.

It is further contended that, if entitled to pay at all, they are not from the 10th of March to the 24th, when the carpenters commenced work, for, during this period, they were employed in discharging cargo, in pumping ship, etc., which was necessary to enable the repairs to be made, and while the repairs were going on it appears that the libellants hove the ship up and down, and kept her clear of water by pumping, and aided the carpenters in various ways, such as passing the copper, nails, etc., etc. As Captain Bumpus says, they were employed all day at hard work. It is contended that, after the repairs were complete on the 14th of April, they should be entitled to nothing more, but the same principle applies to restowing the cargo as the unloading, all which is incident to the repairs. It is analogous to the case of general average when it becomes necessary to take out and store the cargo till the repairs are made and then return it. The whole expense of this is to be averaged. So, too, the pumping of the ship for the common good, or any similar expense, is a general average expense. (1 Parsons on Maritime Law, 298.)

The counsel for the claimants proposes to introduce evidence of the desertion of some of the libellants while at Hongkong: to this objection was made, but the Court said the evidence might be introduced, subject to further consideration.

It appeared in evidence that, after the 29th of April, when this labor was completed for which compensation is claimed, some of the libellants deserted, but no allegation

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to this effect is made in the answer ; and strictly no proof to this effect should have been admitted ; for in Admiralty proceedings, as Chief Justice Story says, in *Cloutman vs. Tunison*, the cause must be heard upon the proof as applied to the allegations. No proofs are admissible of any facts not propounded in the allegations, and the decree must stand upon both. Whatever is not alleged is *coram non judice*. The Court will, however, remark that to make a statute forfeiture of wages, it is an indispensable condition that the person having charge of the log book should make an entry of the name of the seaman on the day when the absence takes place, and that he is absent without leave. The entry is, "seven men took a boat and run away." The requisites of the statute must be rigidly complied with in order to insure the penalty. Here the names of the seamen are not written, and by the log no one of the Hawaiians could be designated. In the case of the "*Rovena*," (Ware, 310), Judge Ware ruled that the entry to support the statute forfeiture must be made the day the absence takes place, and it must state the name of the seaman, and that he was absent without leave ; an entry that the crew were absent, or that all the crew were absent, will not be sufficient without mentioning the names of the seamen against whom the forfeiture is proposed to be enforced. It appears they were absent two days, and were returned to the ship and remained faithful to the ship during the residue of the voyage, and for which they have been paid, and they have paid already thirty-six dollars each for the expenses of capture, and I am of opinion that this is sufficient, especially as no evidence is given of any inconvenience from their absence, it having occurred after the labor incident to the repairs was accomplished.

By the 7th Section of the Act of 1790, United States Laws, the master is authorized to charge the expenses of commitment to the seaman and deduct them from his wages. Can he also insist upon the entire forfeiture of his wages under the 5th Section ? It was ruled in the *Atlantic* (Bee's Rep., 48) that the penalties in these two sections are not cumulative, and that the master may take his remedy under one or the other, but if he elects to imprison the seaman under the 7th Section, he waives the forfeiture under the 5th.

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This is the view taken by Judge Ware in the case of Sherwood *vs.* McIntosh, (Ware's Rep., 113.)

An account has been filed by the agent of the owners, of the payment made to each of the libellants, and which is admitted by them as correct. The Court is of opinion that each of the libellants who are foremast hands are entitled to payment for forty-six days' labor, at one dollar per day, less the amount charged against them in the account above referred to, and that the boatsteerers are entitled to two dollars per day for forty-six days' labor, less the amount charged against them. A decree will be made accordingly, with costs.

Mr. Harris, for libellants.

Mr. Austin, for claimants.

November 27, 1861.

SUPREME COURT—IN ADMIRALTY.

FRANKLIN A. WARREN *et als.* vs. BARK "BENJAMIN RUSH."

To LIMIT the jurisdiction of the Court sitting as a Court of Admiralty under the provisions of the 21st Article of the Treaty with France, in suits brought by foreign seamen, it must appear that the term of service, under their shipping contract, has not yet expired, within the meaning of the decision in Young *vs.* Phillips, (Hawaiian Reports, Vol. 2, page 349.)

The contract being determined by its own terms, the seamen cannot thenceforth be arrested under treaty stipulations upon the Consul's requisition.

The cause of difference giving rise to the suit must relate to the *internal order* of the vessel, and the contending parties be exclusively of the ship's nationality to affect the jurisdiction of the Court, under the provisions of the 21st Article of the French Treaty.

In a suit between American citizens brought to recover wages claimed from an American vessel, the Court adhered to the principle which had been repeatedly declared by the Courts of this Kingdom, sitting as Courts of Admiralty, that they would entertain jurisdiction, where it was for the common benefit and convenience of the parties interested, and when a remission to the distant domestic forum would be attended with great delay and probable loss of material testimony.

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International comity, in certain cases, requires the Courts of this Kingdom to exercise jurisdiction as a friendly act to the citizens of a friendly nation.

It is incumbent upon the masters or agents of whaleships, to make up, at the expense of the owners, the accounts between the ship and each officer or seaman of the crew, and any usage to the contrary deemed unreasonable and would not be sustained by the Court.

Before Justice ROBERTSON :

This is a libel for mariner's wages, filed by F. A. Warren, Wm. S. Beckwith and George Edwards, late first, second and third mates, respectively, on board of the American whaling bark "Benjamin Rush." The libel sets forth that, in the month of January last, the libellants shipped at Honolulu for service on the "Benjamin Rush," Warren G. Fish, master, for a cruise to the North Pacific Ocean, Warren as the first mate, at the thirtieth lay or share, Beckwith as second mate, at the fortieth lay, and Edwards as third mate, at the fiftieth lay ; that the libellants performed their duty accordingly during the season, and that the ship arrived back at the port of Honolulu on the 7th November, bringing 37,936 gallons whale oil, 15,340 gallons humpback oil, 1,696 gallons sperm oil, and 14,000 pounds whale-bone, as the proceeds of the cruise. The libellants claim that they are now entitled to be paid their respective shares as above stated, the oil and bone being valued at the American Consular rates, and that they have demanded payment from Capt. Fish, and from the agent of the owners in Honolulu.

Messrs. Wilcox, Richards & Co., merchants in Honolulu, and agents of the owners, having full control of the business of the vessel, appear as claimants and respondents. In their answer they admit the contract of shipment set forth in the libel, and the service performed by the several libellants, and that the lays or shares, to which the libellants are entitled, are correctly set forth in the libel, as also the quantity of oil and bone procured during the cruise, but deny that the libellant Warren has failed to procure the payment of his wages, or that the libellants Beckwith and Edwards ever made any demand for their wages upon Capt. Fish, or upon any other person having authority in the matter. They further aver that it is the custom to pay all foreign seamen, from American whaleships, at the United States Consulate ; that a few days before service of process they had received notice from the Consulate to go there

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and settle with Warren ; that Mr. Wilcox went there and paid, as the custom is, on the table of the Consulate, all the wages claimed for Warren, and that such wages are at present in the hands of the Consul, subject to the order of Warren, so far as is known to the respondents. And, further, that the libellants have not procured their lawful discharge from the vessel, and therefore have no right to appear in this Court and sue for their wages.

The libellants filed a replication traversing several of the allegations of respondents' answer, but it is unnecessary to recapitulate the several points in detail.

A protest against the Court assuming jurisdiction in this cause was filed by the Consul of the United States for Honolulu, upon two grounds therein set forth, viz : Firstly, that the libellants being citizens of the United States, and still attached to the bark "Benjamin Rush," which is an American vessel, the Consul has the exclusive jurisdiction of the matters and things complained of in the libel, by virtue of the 21st Article of the treaty between this Kingdom and France.

Secondly, that the comity which exists between friendly nations should prevent the Hawaiian Courts from entertaining jurisdiction in cases of claims for wages against the vessels of a friendly foreign nation, especially where such foreign nation has a duly accredited agent here, charged with the duty of taking cognizance of all matters of difference between the masters of such vessels and their crews.

This protest is substantially similar to those filed by the late acting United States Consul, Mr. F. L. Hanks, in the case of *Enos vs. Sowle*, and in that of *Young vs. Phillips*, which were overruled by the full Court after mature deliberation. The protest in this case was likewise overruled, before the hearing of the cause was proceeded with, the Court stating, however, that if anything should be disclosed during the progress of the trial, which in the opinion of the Court, should induce it to decline jurisdiction, the suit would be dismissed. It may be well to state here, briefly, the reasons which led the Court to overrule the Consular protest in the present case. And first, as touching the application of the 21st Article of the treaty with France. The extent to which, in the opinion of the Supreme

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Court, the provisions of that Article limit the jurisdiction previously claimed and exercised by the Hawaiian Courts is pretty clearly set forth in the decisions rendered in the cases of *Enos vs. Sowle*, and *Young vs. Phillips*, already referred to. But there appears to be a slight misapprehension as to the meaning of the language used by the Court in the case of *Young vs. Phillips*, in regard to its hesitation to entertain jurisdiction, in suits by foreign seamen, where such seamen are still "attached to the vessel." The Court, in using that language, did not use it in a technical sense, but as it would be used in common *parlance*, as meaning seamen whose term of service had not yet expired, and who are still "attached to the vessel" by their shipping contract. That such was the meaning of the Court is evident from the fact that *Young*, whose libel was then entertained by the Court, although by implication of law discharged from his contract by the wrongful act of the master, and so regarded as no longer "attached to the vessel," had not been formally discharged before a United States Consul. The libellants in the present case are no longer "attached to the vessel" within the meaning of the decision in *Young vs. Phillips*. After the expiration of the eight "lay days" stipulated for in their contract, counting from the date of the ship's arrival in port, they were no longer attached to that vessel by contract for service. That contract was then determined by its own terms, and the libellants could not thenceforth be arrested, under treaty stipulations, upon the Consul's requisition, as seamen owing service to the "Benjamin Rush."

But, further, and what is more to the point, the 21st Article of the treaty with France, in giving exclusive jurisdiction to the Consul, over "matters of difference," arising between the masters, officers and crews of the ships of his country, where the contending parties are all of the ship's nationality, expressly confines that jurisdiction to matters relating to the "internal order" on board of such ships. Now the cause of difference which gave rise to this suit has not the most remote connection with the "internal order," or government, on board of the "Benjamin Rush," nor with the regulation of the station or duty of any one bound to the vessel by contract for service as master, officer or seaman.

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It is clear, therefore, that the question of jurisdiction is not affected by the provisions of the French treaty, but stands precisely as if that treaty had never existed. But the Consular protest takes the ground that even in that view of the case, this Court ought not to exercise jurisdiction in a suit between American citizens, brought to recover wages claimed from an American vessel. We have so often had occasion to explain our view upon this subject, that it may seem superfluous to say more in this case than that, in the opinion of the Court, this is precisely one of those cases in which, for the common benefit and convenience of the parties interested, the Court ought to retain jurisdiction, in order that the controversy may be settled and justice be done between the parties, at the most befitting time and in the most convenient forum. The respondents, who are the only parties who can possibly be prejudiced by our entertaining the case, have not shocked our sense of right by asking the Court to decline jurisdiction, and remit the libellants to the Courts of Massachusetts for a hearing.

This Court is by no means desirous of burdening itself unnecessarily, with the labor and responsibility of adjudicating the claims of foreign seamen against masters and owners of foreign ships, but would always prefer that they should, if possible, settle those claims out of Court, by the aid and assistance which their Consuls are authorized and required to afford them. But in the present case the libellants entered into the shipping contract at Honolulu, for service on board of the "Benjamin Rush," for one season only, and back to Honolulu, where by express contract the master agreed to discharge them and pay them their wages, taking the value of oil and bone as fixed at the United States Consulate in Honolulu as the basis of settlement. The port of Honolulu thus became the home port of the libellants, and, indeed, so far as regards the settlement of their claim for wages and all its incidents, Honolulu may be looked upon as the home port of the vessel also, for here is an agent and part owner, who has full control of the business of the ship. And as the libellants and the agent of the owners have failed to effect a settlement, with the aid of the Consul, what good reason could be assigned for this

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Court refusing to entertain the suit? The libellants, although of the humble class of seamen, are American citizens, temporarily or permanently residing here; and, as was argued with great force and propriety in the case of *Young vs. Phillips*, have the privilege, in all proper cases, of resorting to the Courts of this Kingdom for the protection and enforcement of their rights, in virtue of the treaty between the United States and the Hawaiian Islands. International comity, therefore, if rightly understood and applied, would seem to me to require the Court to exercise its jurisdiction in this case, as a friendly act to the citizens of a friendly nation.

Again, the decision of one of the chief points in the cause, so far as concerns the libellant Warren, has been regarded in the argument as depending upon the existence, or non-existence, of an alleged usage or custom, said to obtain in Honolulu, in relation to the paying off of foreign seamen. The question as to whether or not such a custom does exist here, and if it is so universal, certain, and reasonable, as legally to bind parties to contracts of shipment made or terminated in this Kingdom, is purely a question of Hawaiian municipal law, which can only be adjudicated and decided with the force of authority, upon Hawaiian soil, by a Hawaiian Court of Justice. No agent of a foreign government has power, authoritatively, to adjudge and declare what shall, or what shall not, be considered a part of the internal law of this Kingdom. And if this cause were remitted for trial to the Courts of the United States, it is obvious that this question of alleged custom would have to be adjudicated there at great disadvantage and inconvenience, while any decision rendered there upon this point would have no effect in any future case as against a contrary decision made by our own Courts.

I will now proceed to examine the merits of the case, which lie within a small compass. The contract set forth in the libel; its fulfillment on the part of the libellants; the amount of oil and bone alleged to have been procured during the season; and the lays or shares claimed by the libellants are all admitted by the respondents. The question is, then, why shall the libellants not have judgment?

The respondents say that Warren should not have judgment,

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because he has not failed to procure payment of his wages, inasmuch as it is the custom at Honolulu to discharge and pay off all foreign seamen, from American whaleships, at the United States Consulate ; that the respondents received notice from the Consulate to go there and settle with Warren ; that Mr. Wilcox went there accordingly, and there paid, as is the custom, on the table of the Consulate, all the lay or wages claimed for Warren, the respondents being only anxious to do what was right, and being altogether indifferent as to whether they paid Warren at their own office or at the Consulate ; and, further, that the sum so demanded and paid is now in the hands of the Consul, subject to the order of Warren, so far as the respondents know. The libellants, in their replication, traverse several of the averments of this answer. They deny that there is a binding custom here to pay off all foreign seamen from American ships at the office of the Consulate ; and the libellant Warren denies that the respondents have paid any sum of money to the United States Consul, or that any money is now in his hands, for the use of Warren, with his (Warren's) consent or approbation. Upon careful examination, I understand this to be the whole case, as made by the pleadings, between Warren and the respondents, and in giving a decision, I feel bound to confine myself strictly to the issues so made. In regard to the question of the alleged custom of paying off all foreign seamen from American ships at the Consulate, it is clear upon the evidence, in my opinion, that no universal or binding custom to that effect exists in Honolulu. Of course all seamen leaving American ships at this port should be formally "discharged" at the Consulate, but there is no law or custom making it compulsory upon the masters or agents of ships to pay the seamen's wages at the Consulate. The accounts may be adjusted, and the wages paid, at the Consulate, or at any other place where it may suit the convenience of the parties to do so ; but if points of difference arise between the parties, it is the especial duty of the Consul, at the request of either party, I presume, to endeavor to adjust those differences, and to effect a settlement, for which purpose he is invested with a certain amount of authority by his Government.

In reference to the other point affecting the claim of Warren,

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viz : as to the placing, by the respondents, of the amount due to Warren in the hands of the Consul for Warren's use, I am of opinion that this part of the respondents' answer is sustained by the proofs. It is proven to my satisfaction, that the amount due Warren is now in the hands of the Consul, although not placed there with Warren's consent or approbation. And it seems to me that under the circumstances, the Court must hold that the fact of Warren's not having desired or expressly consented to the placing of the money in the Consul's hands, can not prejudice the defense. The respective parties met at the Consulate, for the purpose of settling the account of the ship against Warren, and his claim against the ship for wages ; several points of difference arose, which were settled by the intervention of the Consul ; the parties finally agreed upon the balance due to Warren ; Mr. Wilcox placed a bag containing a large sum of money in the hands of Mr. Stillman, the Consul's Clerk, as is usual at that office, and requested him to pay Warren's wages ; Mr. Stillman counted out to Warren's agent the amount due him, less two and a half per cent. commission, said to be retained as a customary compensation to the Consul, for the assistance rendered by his Clerk in making up seamen's accounts ; Warren's agent refused to accept the amount tendered, but the Consul told him the tender was sufficient and that he could have no more, and so the money remains in the Consul's office.

Now, it seems to me that the respondents have done all that could fairly be required of them, in the case of Warren. They have placed the full amount claimed by Warren in the hands of the Consul of the United States, before whom, as the proper officer of the common country of these parties, and in whose Consulate they had adjusted and settled the account between Warren and the ship, requesting the Consul to make payment accordingly ; and the Consul has assumed the responsibility, officially, of withholding a part of the money due to Warren, in the shape of a commission claimed as payable at his office, for extra-official services. Therefore, the fact that Warren has failed to procure payment of his wages is not attributable to the default of the respondents. They may fairly be considered to have made payment of his claim, so far as their legal responsibility extends.

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In connection with this part of the case, testimony has been adduced to show that a practice has prevailed in Honolulu for a number of years past, of deducting from the wages of seamen, whether paid to them through the clerk of the Consulate, or at the office of a commission agent, two and a half per cent., as compensation to the party employed to make up their accounts. On the part of the defense it is contended that this is a binding usage or custom at this port. Strictly speaking, this question is not formally put in issue by the pleadings in the cause. But as it has been discussed at length by counsel for both parties, I have no hesitation in expressing my opinion, that the usage is so unreasonable that it ought not to be sustained by the sanction of a judicial decree. In my opinion it is clearly incumbent upon the masters, or agents of whaleships, to make up, at the expense of the owners, the accounts between the ship and each officer or seaman of the crew. As these officers and seamen receive wages in the shape of a proportionate share of the ship's catchings, and as many months generally elapse before a settlement, during which time a running account for advances to the crew is kept by the master, it is obvious that all the facilities for ascertaining the wages due to each individual, as well as the amount owing by him to the ship, are in the hands of the master or agent of the vessel. To require every seaman, then, to make up his account with the vessel, or to hire a third party to do it for him, would seem to me exceedingly unreasonable; and had the wages of Warren been placed by the respondents in the hands of any private party employed to make up their account, and such private party had assumed to withhold any part of it, in the shape of a commission, without Warren's consent, I would feel it my duty at once to enter a decree in his favor, against the respondents, for the full amount of his claim. But, as I have said before, his money is in the official custody of the Consul of his own country, and if any part of it is withheld, the responsibility rests upon that officer and not upon the respondents. As to Warren, therefore, the libel will be dismissed.

The only point which requires to be noticed, as set up on the part of the defense, against the right of the libellants Beckwith and Edwards to a judgment, is that, as the respondents

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aver, these libellants made no demand for their wages, before commencing suit, which averment is traversed by the libellants.

It appears that the libellants, as they had a perfect right to do, authorized Mr. R. H. Stanley, by power of attorney in due form, to make a settlement of their claims for wages, and of their accounts, with the master or agent of the ship. In pursuance of this authority, Mr. Stanley, as he has testified, called repeatedly upon the ship's agent and requested a settlement, informing him that he was authorized to settle on behalf of the libellants, but without success. He states that he also requested Captain Fish to settle the claims of the libellants, but that he told him Mr. Wilcox, the agent, had the ship's business in charge. Mr. Stanley testifies further, that he presented himself at the United States Consulate, for the purpose of procuring a settlement for the libellants, and that the Consul refused to hear him, on the ground that he declined to permit any member of the legal profession to appear at the Consulate and intervene in such settlements, but did permit him to settle there for Warren, who was unable to be present in person. The testimony of Mr. Stanley is not controverted, except by the averment of the answer, which, in general terms, says the libellants made no demand. I understand that to mean merely that the respondents, under the advice of counsel, aver upon oath that no legally binding demand was made by the libellants. It is argued that because Mr. Stanley did not demand payment, on behalf of the libellants, of any precise sum as due to them, that therefore his request for a settlement did not amount to a sufficient demand in law. In my opinion it would be unreasonable to hold that he should have demanded a precise amount of money, while as yet the amount actually due the libellants was a matter for adjustment with the agent of the ship, who declined to make such adjustment. It is argued further that a sufficient demand in law was not made, because the attorney of the libellants did not present and read his written authority, or tender it to Mr. Wilcox for him to read. In my opinion, such formality was not necessary in a case like this, unless requested, and I regard the reply made by Mr. Wilcox to Mr. Stanley, at the Consulate, as a positive refusal to settle with

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him, for the libellant, and an express waiver of what, under the circumstances, would seem to have been a useless formality, the presentation of his power of attorney. It seems to me that a sufficient demand was made, and that, after their unsuccessful efforts to effect an amicable settlement, the libellants had but one course left, and that was to libel the ship.

The matter will be referred to the Registrar, to assess the amount due the libellants Beckwith and Edwards, allowing all proper items of set off, and decree will be entered in favor of these libellants, for such amount, with costs.

Mr. Montgomery, for complainants.

Mr. Harris, for claimants.

December 6, 1861.

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JANUARY TERM. 1862.

FRANKLIN A. WARREN *et als.* vs. BARK "BENJAMIN RUSH."

PROTEST of American Consul and Commissioner of the United States, against the jurisdiction of the Courts of this Kingdom, sitting as Courts of Admiralty in a case like the present, overruled.

Held, that the exercise of jurisdiction is discretionary in entertaining suits between foreigners, but in a case of special necessity to prevent a failure of justice, the duty is imposed to exercise the jurisdiction.

Distinction drawn (as to the necessity of exercising jurisdiction) between engagements entered into and to be terminated within this Kingdom, and those made at a foreign port for a cruise to end at the same port.

The provisions of the 21st article of the French treaty do not lessen the jurisdiction of the Courts in adjudicating upon contracts for mariners' wages, according to the general principles of the maritime law affecting such contracts.

Although the jurisdiction of crimes and misdemeanors has been yielded, to a certain extent, by the treaty with France ; still, the case of mariners' wages, arising from a contract terminating here, does not come within what is meant.

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by matters of difference touching the internal order of the vessel as expressed in the treaty, and would not, therefore, in such a case, limit the jurisdiction of the Court.

A demand, on the part of the libellants, for a settlement and payment regarded as indispensable before suit brought.

When the parties agree to settle at the Consulate, and the master or agent of the ship deposits there the money due the seamen, presenting a true account of the catchings of the vessel, he has complied with his duty.

The question of the commission, charged by the Consul for such settlement at his office, and deducted by him from the amount to be paid the seaman, is a matter between the seaman or his agent and the Consul.

Judgment of the Court below, so far as it relates to the question of jurisdiction, confirmed; but reversed wherein the claims of the libellants are sustained—ROBERTSON, J., dissenting from the latter portion of the judgment of the full Court.

ALLEN, C. J.

This is a suit *ad rem* against the ship "Benjamin Rush," for seamen's wages for services performed on board said vessel on a cruise whaling.

It was originally instituted in favor of F. A. Warren, William S. Beckwith and George Edwards, and, by the decision of the Court below, the libel was dismissed as to said Warren, but sustained as to Beckwith and Edwards. From this decision the claimants appealed.

The allegations in the libel of the contract of shipment and the service performed, and of the quantity of oil and bone taken, are admitted by the claimants, but they deny that the appellants ever made a demand for their wages upon Captain Fish, or upon any other party having authority in the matter. They further aver that it is the custom to pay all foreign seamen, from American whaleships, at the American Consulate, which they offered to do; and, further, that the libellants have not procured their lawful discharge from the vessel, and therefore have no right to appear in Court and sue for their wages.

The Consul of the United States filed a protest against the jurisdiction of the Court in this case:

1st. On the ground that by the 21st Article of the French Treaty the Consul of the United States has the exclusive jurisdiction of the matter and things complained of in said libel.

2d. That by the comity of nations the jurisdiction ought not to be entertained.

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The counsel for the respondents presented the following in the name and on the behalf of the Commissioner of the United States, on the trial of the appeal before the full Court, viz :

1st. The Government of the United States deny the right of jurisdiction of the Hawaiian Courts, in all matters of difference between American citizens, upon, or attached to, American ships, in all maritime matters, without the consent of the parties interested ; or against the protest of American officers, accredited to this Government.

2d. The Government of the United States insists upon its own interpretation of its own laws, treaties, and Constitution, in all matters relating to official duties, and official responsibilities, or in the internal order, discipline and administration upon American merchant ships, in all matters whatsoever, and particularly when the revenue of the country is involved.

While we do not regard it in accordance with usage for foreign officers invested with diplomatic powers, and in a diplomatic capacity, to impose their objections to the progress of a case in Court, in the nature of a protest, yet we will waive this objection, and give his points the respectful consideration which their legal force and the eminent source from which they emanate render proper.

It may be well to review the principles of the maritime law as recognized by the judicial authority of other nations, and especially by the nation under whose flag this vessel sails, and then to examine the 21st Article of the French treaty, to see how far these principles have been limited in their application to this Kingdom.

For a brief review of the authorities on maritime jurisdiction, I will refer to the decision of this Court in the case of *Enos vs. Sowle*, Hawaiian Reports, Vol. 2, p. 332.

“It seems to be well settled, after some controversy, says Parsons, who is an eminent American jurist, that an Admiralty Court has full jurisdiction over suits between foreigners, if the subject matter of the controversy is of a maritime nature. It is, however, a question of discretion in any case, and the Court will not take cognizance of the cause, if justice would be as well done by remitting the parties to their home forum.” He further says that “it is in cases of seamen’s wages that the

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power of the Court is most frequently invoked, and it is well settled that cognizance of a suit will be taken when justice demands that it should be done, as when the voyage is broken up at a port of this country, or the seaman is compelled to desert on account of cruel treatment, or is entitled to be discharged on account of deviation." I will advert to some of the authorities referred to by the learned author, as well as to some others. (Parson's Maritime Law, 2 vol., 54 sec.)

In the case of *Taylor vs. Carryl*, 20 Howard's Rep., 611, the learned Chief Justice of the Supreme Court of the United States says: It is true that it is not in every case obligatory upon our Courts of Admiralty to enforce it (a lien) in the case of foreign ships, and the right or duty of doing so is sometimes regulated with particular nations by treaty. But as a general rule, where there is no treaty regulation, and no law of Congress to the contrary, the Admiralty Courts have always enforced the lien where it was given by the law of the state or nation to which the vessel belonged. In this respect the Admiralty Courts act as International Courts, and enforce the lien upon principles of comity. There may be, and sometimes have been, cases in which the Court, under special circumstances, has refused to interfere between the foreign seaman and ship-owner; but that is always a question of sound judicial discretion, and does not affect the jurisdiction of the Court." In *Ellison vs. ship "Bellona"*, Bee 112, the Court say that "Courts of Admiralty have a general jurisdiction in causes, civil and maritime. The case of seamen's wages comes within this description of causes; and this jurisdiction has been uniformly exercised by me, as regards foreigners generally." In *Pugh vs. Gillan*, 1 Calif., 485, where the plaintiff was a British subject, shipped on time, and was discharged by the master some days before the time expired, because the vessel was about to sail on a long voyage, it was held that he could sue in our Courts, though the vessel and captain were English. In the case of *Davis vs. Leslie*, Abbott's Ad. Rep., 131, the Court say: "That the foreign libellant is regarded as not entitled to invoke the power of the Court as matter of absolute right; yet where the Court is satisfied that justice requires its interposition in his favor, those powers may be, and will be, exercised in his behalf." The authorities, both English

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and American, fully sustain the doctrine of the power of the Admiralty Courts to entertain suits between foreigners; while, at the same time, its exercise is discretionary. If it is a case of special necessity to prevent a failure of justice, the duty is imposed to exercise the jurisdiction. (The "*Courtenay*," Edw. Admiralty Rep., 239; the "*Wilhelm Frederick*," 1 Hagg. Adm. Rep., 138; *Willendson vs. The "Torsomet*," 1 Peter's Adm. Rep., 196; in the "*Jerusalem*," 2 Gall. Rep., 191; the "*Aurora*," 1 Wheaton Rep., 96.) In the case of *Johnson vs. Doltan*, 1 Cowen, 543, which was an action by a seaman against a master, both foreigners, for assault and battery committed on ship-board, the Supreme Court of the State of New York sustained the jurisdiction. They say: "Our Courts may take cognizance of torts committed on the high seas on board a foreign vessel; but on principles of comity, as well as to prevent the frequent and serious injuries that would result, they have exercised a sound discretion in entertaining jurisdiction or not, according to circumstances."

In the case of *Davis vs. Leslie*, Abbott's Ad. Rep., 134, Judge Betts says "that it seems to be the settled understanding and course of Courts of Admiralty, as already intimated, not to permit their jurisdiction to be invoked as matter of right to sustain suits brought by foreign seamen against masters or owners, being also foreigners, or against foreign vessels. In England, indeed, the assent of the representative of the Government to which the seaman belongs is required before the Courts will proceed to entertain jurisdiction. (The "*Wilhelm Frederick*," 1 Hagg. Ad. Rep., 138.) But in the Courts of the United States this precautionary condition is not required; and jurisdiction will ordinarily be exercised, if the voyage has been terminated by full completion or abandonment, or if the contract of hiring is dissolved by the wrongful act of the owner or master."

In the case of the "*Bee*," Ware's Rep., 337, which was for salvage service, a motion was made by respondent to dismiss the bill, because the parties in the cause, both libellants and respondents, are foreigners, and subjects of the King of Great Britain, and because the vessel is not only a British vessel, but was taken by the salvors, after the disaster had happened, from British waters, and brought within the jurisdiction of the Court.

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Judge Ware overruled the motion, and, in giving his opinion, said : " The Courts of this country are not bound to take jurisdiction of controversies between foreigners having no domicile in this country, as they are when parties are citizens or residents among us, and are thus entitled to claim of right the benefit of our laws. The question is not one affecting the competency of the Court, but it turns upon the expediency of taking jurisdiction in this particular case." In the case of the bark " Havanna," it appeared the ship was owned by a British subject, living in St. Johns, New Brunswick, and a creditor of his, who was also a British subject and residing in the same place, instituted a suit against him in the Courts of Massachusetts, and attached the vessel, then lying in the port of Boston, and afterwards recovered judgment and took out an execution, by virtue of which the vessel was sold, and purchased by the execution creditor ; whereupon the master libelled the vessel for his wages, by virtue of the statute of 17 and 18 Victoria, which gives a lien to a master on his ship for his wages ; and Judge Sprague, eminent and of long experience in Admiralty, ruled " that the District Court may, but is not bound to, exercise jurisdiction in favor of a British subject against a British vessel, and that the lien so given may be enforced in the Admiralty Courts of the United States." (22 Vol. Law Rep., 150.) The ship was arrested and sold on the application of a British creditor, who had no security on the ship, for the payment of a debt existing by British law, and another British subject having a lien, which gave a paramount right under the British law, appeals to the Court for a remedy. Judge Sprague says : " That to refuse his application would be to sustain by our tribunals the inferior and subordinate claim of one British subject, and to refuse the higher and paramount claim of another. It would be not only doing injustice to the libellant, but a friendly nation might well complain of such a perversion of her law by a partial administration of it."

Supposing, for example, the owners of the " Benjamin Rush " had made sale of her, or her master had succeeded in getting his clearance and ship's papers by misrepresentation, and was in the act of sailing without paying the crew, whose contracts terminated here, it will not be denied that their claim is of a

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maritime nature, and will it be contended that the Court of Admiralty has not jurisdiction to enforce such a claim? There is a practical difference in the necessity of taking jurisdiction to prevent a failure of justice in the engagements at the home port for the voyage, and of those made at a foreign port for a cruise to terminate at the same port. If the lien is lost at the foreign port, it is probably lost for ever, for it is not within the range of probabilities that the seaman will have another opportunity to enforce it, as Sir William Scott says, in the case of the "*Two Friends*," 1 Rob. Rep., 271, 280: "It is the only way of enforcing the best security, that of a lien on the property itself." In the case of the "*Jerusalem*," 2 Gall. Rep., 198, Judge Story says: "That when the contract has been dissolved by the regular termination of the voyage, or by the wrongful act of the other party, the cases are not unfrequent in which foreign Courts have sustained the claim for mariners' wages. The "*Catherina*," 1 Peter's Rep., 104; the "*Torsomet*," 1 Peter's Rep., 197; *Moran vs. Banden*, 1 Peter's Rep., 415. Mr. Justice Curtiss, of the Supreme Court of the United States, overruled a protest of an English Consul to the jurisdiction of the Court, in a case where the libellant, an American citizen, had been hired in Boston for a voyage in an English registered vessel, with an English master, from Boston to St. Jago and back to a port in the United States. The voyage was performed and the men discharged in Boston. An action was commenced in a cause of personal damage, and the English Consul filed a protest to the jurisdiction, setting forth that the vessel was a British vessel and the commander a British subject; also, "that an investigation of some of the alleged causes of damage must call in question official acts and conduct of a British functionary in regard to British subjects, for which he is responsible only to his Government." Mr. Justice Curtiss, in giving his opinion, said: "It is true this Court should not call in question a British Consul, for his official acts respecting the crew of a British vessel in a foreign port. It is correctly stated in the protest, that he is responsible solely to his own Government: or if to individuals, such responsibility grows out of the municipal laws of his country, which this Court would not undertake to administer. But it does not follow that the conduct of the

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master of such a vessel, in procuring the official intervention of the Consul, upon false allegations, to the injury of an American citizen by imprisonment in a foreign jail, is not to be here investigated. That depends on other considerations, and is not distinguishable from any other wrong done by the master, of which this Court should take or refuse jurisdiction according to the national character and domicile of the parties, and the place of termination of the voyage." The "*Courtenay*," Edw., 239; the "*Calypso*," 2 Hagg., 209; the "*Salacia*," 2 Hagg., 262; the "*Madonna*," 1 Dodson, 37; the "*Two Friends*," 1 Rob., 271; the "*Johann Friederich*," 1 Wm. Rob., 38; the "*Bee*," Ware's Rep., 332; the "*Jerusalem*," 2 Gal. R., 191.

The Court fails to see the force or application of the second point in the Honorable Commissioner's protest. The Court does not call in question the official duties, or the official responsibilities, of any of the United States officers, and if the doctrine is sound, which we do not controvert, that the United States can properly insist on its interpretation of its own laws, treaties and constitutions, this Kingdom will undoubtedly insist on the same doctrine as applicable to its laws, treaties and constitutions. Under this exposition of powers, the construction of the 21st Article of the treaty with France, as made by this Court, settles the question, that the case of a mariner's wages, arising from a voyage which terminates at this port, is within its jurisdiction, inasmuch as by our construction of the treaty, it does not vary the maritime law, or lessen the jurisdiction of our Courts upon the contracts for mariners' wages.

It is contended further, that the revenue of the country is involved in securing the fees, and a portion of extra wages arising from the discharge of a seaman; and, therefore, this Court should not exercise jurisdiction. No statute of the United States has been adduced making a discharge a condition precedent to a settlement for mariner's wages. So far as this argument applies, it is the same whether the settlement is made at the Consulate, at the counting-room of the owner by mutual agreement, or the claim enforced by an adjudication of this Court. The Consul, as I understand from the record, does not regard it his official duty to make the calculations and settle the accounts, but only to settle the disputes between master and

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seaman, if any exist. They are at liberty to settle where they please, and on the terms satisfactory to themselves. The discharge is a matter for the seaman to attend to. He requires it as a matter of protection to himself, to enable him to receive the two months extra wages in cases allowed by the laws of the United States, and to procure a permit to remain in the Kingdom for sixty days. But it is argued that the discharge should not be given till after a settlement, as this would be used as an incentive to procure it, and thereby enable the master to account for his men. If the seaman neglects, after settlement, to procure his discharge, the master can protect himself by a certificate that he has left the vessel, and on the score of revenue, the fee for this service, we believe, is as much as for a discharge, so the revenue will not suffer, neither will the master, for he pays the fee in either case.

Reference has been made to our laws on the subject, but they only interdict the discharge, unless the seaman has procured from the Harbor Master a permit to remain in the Kingdom for sixty days. But on the revenue question the Court does not perceive that the exercise of jurisdiction will have any influence, for the same power to enforce a discharge exists after, as before, settlement.

By the law of nations, the jurisdiction of all crimes on the high seas belongs exclusively to the country to which the vessel belongs, and under whose flag she sails; but when crimes and misdemeanors are committed within the jurisdiction of another country, although in enforcing discipline and order they were cognizable by that country, and the accused could not be tried by any other jurisdiction. By this treaty we yielded the exercise of jurisdiction of our ports to this extent, unless invoked by the Consul of the nation. But we do not regard the case of a mariner's wages arising from a contract which terminates here, as this does, as coming within what is meant by matters of difference touching internal order, as expressed in the treaty. The practice of the French marine in always shipping seamen for the voyage, and never discharging them in foreign ports, and the duties and obligations which they incur to the Government, is in direct contrast to the practice of the American marine, as well as to the obligations of their ship-

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ment, has unquestionably given to the French construction of the article an extent to which its language, or practice under any other marine, would not suggest.

In the whaling service, full crews are frequently shipped at this port for a cruise for the season only; and although the contract is made here and terminated here, yet, generally, a settlement is made without appeal to the Court. We claim, however, that the jurisdiction exists, and that it rests in the discretion of the Court when to exercise it. The Hawaiian subjects have a claim on the Court, and so has the domiciled alien—greater certainly than the foreigner. In this case the libellants sailed from this port, where they made their contract, and where it terminated; this suit arises from the contract to pay wages for services rendered on claimant's vessel, and it must be governed by the principles of maritime law, and not by municipal law. Here the cruise had terminated by the full performance of all the duties required by the contract. It was instituted here for the specific purpose of a season's whaling in the North Pacific, with the agreement to return to this port, and here to be discharged and paid. This presents an entirely different case, as applied to the discretion of the Court, for the exercise of jurisdiction, from a shipment for the entire voyage from a home port. It would be a case of the latter class of unusual circumstances, and which would lead to an utter failure of justice, to induce the Court to assume jurisdiction; but that they have the jurisdiction is as clear as any other principle of maritime law, and which this Kingdom, from her position in this great ocean, cannot surrender, while she retains a true appreciation of the high purposes, duties and obligations of an Admiralty Court.

Mr. Benedict, in his Admiralty Treatise, p. 159, section 282, says: "There have been attempts in England and in this country to establish an exemption (from jurisdiction) in favor of the seamen of foreign merchant ships. It has been sometimes placed on the ground of the comity of nations; sometimes on the fancied ground that a vessel is part of the territory of the nation to which she belongs; sometimes on the ground that there can be no jurisdiction in such cases without the consent of the Consul, or other diplomatic representative of the foreign

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nation to which the seaman of the vessel belongs, all of which are fallacious. There is no such comity of nations—nothing within the territory of a nation is without the jurisdiction, and no officer of a foreign Government can grant or destroy the jurisdiction of our Court. Some exemptions are established by the Constitution, some by treaty, and some by the established and immemorial usage of nations, and they do not apply to persons and property engaged in the ordinary pursuits of commerce. In the present state of international intercourse and commerce, all persons in time of peace have the right to resort to the tribunal of the nation where they may happen to be for the protection of their rights. The jurisdiction of the Courts over them is complete, except when it is excluded by treaty.”

Judge Betts says, in the case of *Bocker vs. Kloskgetu*, Abbott’s Ad. Rep., 408: “In one respect, indeed, the American Courts show a greater favor to seamen, in these cases, than do the Courts of Great Britain, for the former proceed, irrespective of any interference on behalf of the seaman by his Consul or other national representative, whilst the English Courts would seem still to insist that the sanction of such an officer shall be procured unless the nature of the case forbids.” He further says that this precautionary condition is not required in the Courts of the United States, and that jurisdiction will ordinarily be exercised if the voyage is terminated.

It has been contended that the 21st Article of the French treaty has the same force and effect as the 8th Article of the Consular Convention between the United States and France. The latter has express reference to the Consular cognizance of matters of difference between captains, officers and crews of merchant vessels of their own nation, which may arise not only in port but at sea; and particularly refers to the adjustment of wages, and the execution of contract; whereas the article of the Hawaiian treaty confines the Consular cognizance to the internal order on board, and this shall be exclusive in cases where the parties are exclusively of the same nationality of the vessel, and the local authorities shall not interfere unless the public peace and tranquility are disturbed and endangered. This condition renders it conclusive that the article did not refer to the high seas, and equally conclusive when it refers to crimes,

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misdemeanors, and other matters of difference in relation to internal order. The intention was to relinquish the exercise of jurisdiction in port over crimes and misdemeanors, which, by the laws of nations, each nation is invested with on the high seas, so that each should enjoy the exclusive jurisdiction of crimes and misdemeanors, not only on the high seas but in port. This was a relinquishment of the exercise of jurisdiction by each nation to that extent, as well as to all matters of difference of internal order on said vessels in port, which refers to the discipline and general administration on board. It has no reference to the adjustment of wages and the execution of contracts, as is expressly contained in the 8th Article of the Convention between the United States and France.

By reference to the 4th Article of the French treaty, it will be seen that the most ample protection is guaranteed to the subjects of both countries, and especially in their access to the tribunals of justice in every degree of jurisdiction established by the laws. It is in these words :

“ARTICLE IV.—Their respective subjects shall enjoy, in both States, a constant and complete protection for their persons and properties. They shall, consequently, have free and easy access to the tribunals of justice in prosecution and defense of their rights, in every instance, and in all the degrees of jurisdiction established by the laws. They shall be at liberty to employ, in all circumstances, the advocates, solicitors or agents of every class that they may think proper ; in fine, they shall enjoy, in all these respects, the same rights and privileges which are or may be granted to native subjects.”

By parity, these libellants must enjoy the advantages of this jurisdiction, unless they are controlled by the 21st Article, which, in our view, they are not, and we regard it as somewhat singular that such a forced construction should have been placed on this article. Many ships which visit this place are from distant and remote countries, and engage men at this port for a season's cruise, who are to be discharged here, as in the case before us. On completion of the contract, if the master refuses to pay the amount due to the seamen, the Consul having no judicial power, he cannot enforce the payment, and the seaman is without remedy, for he cannot follow the ship in her wanderings to her dis-

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tant home, and it is an utter denial of justice. There are ships owned in part at least by parties residing here, as in this case, and there is no guarantee or assurance they ever will return to their home port. This construction would be in gross violation of provisions contained in our treaties where we guarantee easy access to the tribunals of justice ; but it is said that the local authorities may be allowed to interfere if the Consul of the nation approves or consents. While we do not regard our jurisdiction as thus trammelled or controlled, at the same time we shall always give great respect and consideration to the opinion, on the propriety of exercising jurisdiction in this particular class of cases.

The Court here declare that it is with reluctance that they entertain jurisdiction in cases between foreigners, but they regard it as an imperative duty, when they come clearly within the principles of the maritime law, or treaty stipulations.

It appeared in evidence that Mr. Stanley was duly authorized by the libellants to effect a settlement of their voyage with the ship "Benjamin Rush," and in pursuance of said power he called on Wilcox, the agent and part owner of said ship, who resides and is doing business here, on the 15th of November, and inquired when he would be ready to settle with the crew, as the parties whom he represented were anxious to know. After some conversation he said : "When I pay off the men they will have to go up to the Consulate." On the 19th he called again and demanded a settlement, and the discharge of the parties he represented. The agent replied : "When you want a settlement you will have to go to the Consulate."

It appears that Mr. Stanley called at the Consulate and stated to the Consul that the three first officers of the "Benjamin Rush," who are the libellants, wanted their discharge, and after some conversation the Consul sent for Mr. Wilcox to come to the Consulate, and when he arrived the Consul said, "Warren must be settled with," and Wilcox replied "that he had never refused to settle with him," to which Mr. Stanley replied that he refused to settle with him as his agent. Wilcox then said he would settle for 1,600 barrels, as he had with another of the crew. Mr. Stanley objected to this, and proposed

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to wait till the oil was gauged and the bone weighed. On the 23d he understood that the amount of oil and bone was ascertained, and he called again at the Consulate, and the Consul told him that they were going to pay off on Monday. On Monday the parties met at the Consulate and settled the account of Warren. There were some questions of difference which the Consul settled, and they (Stanley and Wilcox) finally agreed on a settlement at \$419 49. Mr. Stanley says that Mr. Wilcox handed a bag, which he said contained \$2,000, to the Consul's Clerk, and requested him to pay the amount out of it, and he offered to do so, less 2½ per cent. commissions. Mr. Stanley objected to this charge, and said to Mr. Wilcox the Clerk had not paid him the amount agreed upon, to which he replied that he did not know anything about it; and after some discussion with the Consul in relation to the propriety of this charge, Stanley left the office.

It appears by the testimony of the Consul, that Mr. Stanley was the first to ask his assistance in the case of Warren. This was designating the place of settlement on his part, and he never objected to the Consulate as a proper place of settlement when it was insisted upon by Mr. Wilcox; therefore, it may well be considered as fixed by mutual accord. It was a proper place, generally resorted to for settlement; it was where the ship's papers were, and where each party could appeal to the Consul to settle any matters of difference which might arise. As to the amount due Warren, it was agreed upon after an examination of the accounts by Stanley and Wilcox, but a disagreement arose between the Consul and Mr. Stanley in relation to the commission, and he retired without taking the money proffered for the payment of Warren, and without making any further effort to effect a settlement for Edwards and Beckwith.

Mr. Stanley testifies that Wilcox handed a bag containing money to the Consul's Clerk, stating that it was about \$2,000, and requested him to pay him from it. Mr. Stillman testifies that this deposit was made for the disbursement of the crew of the "Benjamin Rush." When parties agree to make a settlement at the Consulate, and the master or agent of the ship deposits the money for the payment of whatever amounts may be

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due, and presents a true account of the catchings, he has complied with his duty. If he has any accounts against the seamen, he will of course present them. The shipping articles contain the terms of the contract, and, from this data, the amount due is easily ascertained. We do not see what more remained for the agent of the ship to do. If there were obstacles interposed by the Consul to prevent Mr. Stanley from attending to the settlement, Wilcox was not responsible for it. The question simply is, Has Wilcox done his duty? After the parties met at the Consulate, we are of opinion that he has, but his mode of doing it has well nigh deprived him of this defense; and when Mr. Stanley found that it did not accord with the views of the Consul to have him make the settlement there for Beckwith and Edwards, it was incumbent on Mr. Stanley to have so stated to Mr. Wilcox to that effect, and proposed some other place of settlement.

It does not appear that he took this course, but his principals on the following day filed this libel against the ship. Although there may have been occasions in Mr. Stanley's efforts for a settlement when he could have taken the position that Mr. Wilcox had refused his demand, yet after he had called on the Consul for aid in effecting a settlement for these libellants, and he had sent for Wilcox to come to the office and settle Warren's voyage, and in accordance with that request he had come, and being at the place each had selected, they had examined the accounts, and agreed upon the amount due Warren, and in pursuance thereof, he had deposited with the Clerk \$2,000, not only to pay Warren, but the rest of the crew, was it not incumbent on Stanley, if he was prevented from making a settlement there for Beckwith and Edwards, to have informed Mr. Wilcox to that effect, and demand a settlement and payment at some other suitable place? But this was not done—which, under all these circumstances, the Court regard as a legal necessity, antecedent to a suit. We do not regard it as necessary to advert to any other points made in the case by the respondents.

We are of opinion that the judgment of the Court below, so far as it relates to the question of jurisdiction, should be confirmed; but so far as it sustains the claim of the libellants, (Beckwith and Edwards,) it should be reversed and the bill dismissed.

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ROBERTSON, Justice, said :

In all that part of the judgment of the Court, as now announced by the Chief Justice, which relates to the important subject of jurisdiction, I fully concur. But from so much of the judgment as dismisses the libel in this case against the libellants Beckwith and Edwards, as well as the libellant Warren, I respectfully dissent. Under the circumstances, I think the libellants had good right to file their libel, and were well in Court. A sufficient demand, on the part of the libellants, is proven to my satisfaction, and no plea of tender is set up by the defense in the case of Beckwith and Edwards, as in that of Warren; nor is there sufficient evidence upon the record, in my opinion, to have supported such a plea. The claim of the libellants is admitted to be an honest one, for wages faithfully earned, and which were justly due when the libel was filed. I think, therefore, the libellants, Beckwith and Edwards, are entitled to a decree in their favor; but I bow with deference to the contrary opinion of the majority of the Court.

Mr. Montgomery, for complainants.

Mr. Harris, for claimants.

January 9, 1862.

SUPREME COURT—IN EQUITY.

JULES DUDOIT vs. THOMAS SPENCER.

WHERE parties had transacted business with each other in a loose manner, rendering it difficult for the Court to measure the amount of pecuniary damage, sustained by the party invoking its aid, the Court, sitting as a Court of Equity with the consent of the parties, adopted the principle of *cy près* in assessing the damages to be awarded.

A party complainant having retained accounts furnished him by the defendant, for a great length of time, without objection as to their correctness, having had opportunity, was held to have waived the right to make such objections, and said acts were regarded as conclusive against him.

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The Court per Justice ROBERTSON :

The complainant in this cause alleges in his bill, in substance as follows, viz : That in the autumn of the year 1858, he was the sole registered owner of the Hawaiian schooner "Alice," and entered into an agreement with Thomas Spencer of Honolulu, the defendant, to take an interest in said schooner, and to fit her out for a whaling voyage, under the control and management of the defendant, who had her repaired and fitted out, and dispatched her to the Coast of California about the month of November, 1858, under the command of Rhodes Spencer ; that after her departure, defendant furnished the complainant with an account, by which it was made to appear that said schooner and outfit had cost \$9,168 52, (valuing the vessel before her repair at \$2,000,) and by which account defendant takes to himself six-sevenths interest in said schooner and outfits, and allows the complainant one-seventh interest therein, but which account contains overcharges in items for supplies ; that the schooner returned to Honolulu in the spring of 1859, when the defendant disposed of the oil procured by her, and having furnished her with the requisite supplies, dispatched her on a cruise to the North, where she whaled during the summer, but did not return to these Islands, her then master, Joseph Spencer, having transhipped her catchings to the bark "Florence," owned by defendant, which brought the same to Honolulu, but as to how much such catchings amounted to, or how the same was disposed of, the complainant has no means of knowing ; that in the spring of 1860, defendant forwarded a master, officers, crew and supplies to the schooner, to enable her to whale during the summer of that year, with the assent of complainant, when she had a very successful season, having taken ten whales, which were cut in by her crew, the greater part of the blubber, however, being carried on board of the "Florence," and there tried out and put into casks in common with the oil procured by her boats ; and that, in particular, one large whale secured by the boats of the schooner was taken alongside the "Florence," cut in and mixed with her catchings ; that the schooner was of sufficient capacity, and furnished with sufficient means, for trying out and stowing away her own catchings, and therefore the trying out and stowing away of her oil on board the "Florence,"

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was unjust towards the schooner, and the complainant as part owner ; that the " Florence " returned to Honolulu about the 26th October, 1860, when defendant disposed of the oil and bone brought by her, including that procured by the schooner ; that the " Alice " had again been left at the North, in Shantar Bay, contrary to the desire and expressed wish of the complainant, notwithstanding that all the moveable property on board of her had been stolen by the Indians the previous winter, and although said schooner was in a condition to have made the voyage back to Honolulu in the early part of the fall season ; that the conduct of the defendant in taking and stowing the catchings of the schooner on board the bark " Florence," was unjust towards the complainant, who never had any connection with said bark, and denies the right of the defendant to involve the catchings and accounts of the schooner with those of the bark, but claims that the same should be kept separate, as regards the summer season of 1860, when the catch of the schooner was large, in like manner as was done with those of the two previous cruises, when her catch was comparatively small ; that complainant has been unable to procure from defendant any account of the proceeds of the whaling cruise of 1860, and has also been damnified by the " Alice " having been left for another winter in the northern seas, against his express protest ; and the complainant prays that an account may be taken of the proceeds of the catchings of the " Alice," and of the disbursements made by defendant, and that he may have compensation for the damage he has sustained by the detention of the " Alice " in Shantar Bay, and the appropriation of his share of that vessel by the defendant, without his consent.

The defendant, in his answer, admits that he entered into an agreement with the complainant, in the fall of the year 1858, to fit out the " Alice " for a whaling voyage under his management, in pursuance of which agreement said vessel was fitted out, and sent to the Coast of California about November, 1858, and that after her sailing he furnished to complainant an account of disbursements and supplies, which he avers to be correct and containing no overcharges. Defendant further admits that the " Alice " returned in the early part of 1859, when he disposed of her catchings, and that she was refitted and dispatched to

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the North on a whaling cruise, from which she did not return. her catchings being transhipped on board of the "Florence," which brought the same to Honolulu; and avers that complainant has been shown the account sales of such catchings as furnished the defendant, who has also rendered an account current to the complainant, giving him credit for his net interest. Defendant admits, also, that, in the spring of 1860, he forwarded a master, officers, crew and supplies for the "Alice," with the concurrence of the complainant, but that the crew were shipped on the articles of the "Florence," and furnished with provisions belonging to her, with the understanding that the "Alice" was to be used as a tender to the "Florence;" and he avers further, that the men employed on the "Alice," during the season, were only sufficient to man her boats for whaling, at which they were constantly employed, and it was impossible to try out the "Alice's" blubber on board of that vessel, wherefore it was taken on board the "Florence" to be tried out and put in casks, that vessel being supplied with extra men for that purpose. Defendant further admits that the "Alice" had again been left in Shantar Bay, but avers that she was of necessity abandoned, being unseaworthy and incapable of performing the voyage back to Honolulu, after the close of the whaling season. Defendant avers an agreement with complainant that the "Alice" should be used as a tender to the "Florence," during the summer of 1860, and that he is ready to allow, for the services of the "Alice," such proportions of the catchings during that season as may be just, so soon as the same are sold and accounted for, which had not been done when the suit was commenced. Defendant denies that complainant has ever complained of the leaving of the "Alice" at the North during the winter of 1859-60, but has always expressed himself satisfied with the defendant's management, up to the return of the "Florence" in the fall of 1860, when he complained because the "Alice" had not been brought back. And defendant avers that he instructed the master of the "Florence," if he should find the "Alice" in a condition to make the passage to Honolulu, to man her and send her down, but that, as he is informed and believes, she was unfit to make such passage, and therefore left in Shantar Bay.

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Complainant filed a replication, in which he denies that there was any understanding or agreement between the parties, in the spring of 1860, that the "Alice" was to be used as a tender to the bark "Florence;" or that the "Alice" was abandoned or left in Shantar Bay, as unseaworthy for a voyage to Honolulu; and traverses several other less important averments contained in defendant's answer.

This case, so far as concerns the joint adventure prosecuted by the complainant and defendant, during the winter of 1858-9, and the summer of 1859, would seem to be a plain one. The complainant being owner of a schooner called the "Alice," lying in the port of Honolulu, entered into an agreement with the defendant, a ship chandler interested in the whaling business, whereby the latter was to prepare, fit out, and supply the "Alice" for sea, as a whaler, on joint account, the vessel being valued in the hands of complainant at two thousand dollars. In accordance with this agreement, the defendant had the "Alice" repaired, fitted, victualled, and manned for whaling, and dispatched her on a cruise to the coast of California, under the command of Rhodes G. Spencer. Within a reasonable time after the vessel had sailed, and in accordance with what is believed to be the usage in that business, the defendant rendered an account to the complainant, as part owner in the enterprise, showing the expenses and disbursements incurred in getting the "Alice" to sea. That account exhibits the entire outlay as \$9,168 52, including the valuation put upon the vessel, and allots to complainant one-seventh share, as his interest, the difference between \$2,000, the value of the vessel, and \$1,309 79, the exact one-seventh part of \$9,168 52, consisting of an amount previously due from complainant to defendant. The complainant charges, in his bill, that this account is incorrect, containing numerous overcharges in the items for supplies; and he has introduced testimony by several disinterested witnesses, tending to show, certainly, that several important articles of supply are debited to the adventure at unusually high prices, swelling the aggregate amount, and tending to reduce the proportional share which should be allotted to the complainant. But it is argued on the part of the defendant, that it is now too late for the complainant to make any objections to this ac-

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count, and that if he had objections to make he was bound to have made them immediately, or at least within a reasonable time after being furnished with the account. It appears by the evidence that the account was rendered to complainant in the month of February, 1859, and there is no proof that he raised any objections to it as being incorrect, or containing overcharges, till the fall of the year 1860, after the return of the bark "Florence" from her second cruise to the North. The same is true with respect to the second account rendered by defendant, which exhibits the outlay incurred between the return of the vessel from the coast of California, and her departure for the North, and also the result of the joint adventure up to the 6th of Jan., 1860, at which date the complainant had credit for \$117 43, as his share of the net proceeds, after the catchings of the "Alice" for the summer season of 1859. in addition to those of the previous winter season, had been realized on. We think the position taken for the defense is a sound one. It was so held by this Court in the case of P. S. Wilcox and F. L. Hanks *vs.* J. F. B. Marshall. (Hawaiian Rep. Vol. 2, p. 296.) The complainant having retained these accounts in his possession for so great a length of time, without having made any objections to the amounts charged for supplies, or having questioned the correctness of the net proceeds as exhibited by the account current, he must be held to have waived the right to make such objections, and the accounts must now be regarded as conclusive. But this will not prevent the correction of a clerical error which appears in the first account, consisting of the item of \$118 50, for potatoes, twice debited.

But that part of the case which arises from the transactions which transpired subsequent to the close of the whaling season of 1859, is by no means plain; on the contrary it is perplexing and difficult to adjust satisfactorily. In the first place, when the season of 1859 closed, the oil and bone procured by the "Alice" was transhipped to the defendant's bark, the "Florence," for transportation to Honolulu, and the "Alice" was left in Shantar Bay for the winter, without the complainant's knowledge or consent. This was a deviation from the course of operation agreed upon by the parties, of which no satisfactory explanation appears, and for which no sufficient justification is

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shown. Had the schooner returned to Honolulu, she might, so far as appears before us, have been again refitted and dispatched on a cruise to the Coast of California, where she met with a successful season the previous winter ; or she might have been otherwise profitably employed, or disposed of, for the interest of those concerned. The complainant now claims compensation for the loss resulting from the detention of the vessel at the North through the winter, and that compensation can only be given in the shape of pecuniary damages. An action at law would seem to be the most proper mode of seeking redress in this particular, and also as regards some other parts of the complainant's demands. But at the request of the parties, the Court has consented, although sitting as a Court of Equity, to assess and award damages, as would be done by a jury at common law, wherever we may consider the complainant entitled to redress in that form. His claim for compensation on this branch of the case seems just and reasonable, and we now award him the sum of one hundred and fifty dollars damages.

The next subject for consideration is the complainant's demand for an account of the "Alice's" catchings during the summer season of 1860. He claims that she shall be regarded as having operated as an independent vessel during that season as she did previously ; while on the part of defendant it is claimed that she acted during that season as a tender to the "Florence," in pursuance of an understanding between the parties. Clearly the burden rests upon the defendant of proving any new agreement or understanding to that effect, and we must presume that the original agreement still remained in force until the contrary is shown. This the defendant has not done to the satisfaction of the Court. There is no evidence of an express agreement with complainant, that the "Alice" should be used as a tender, while the defendant's book-keeper testifies that, even upon his own books, no account was ever opened with the "Alice" and her owners, dealing with her in any other capacity than that of an independent whaler, and Joseph R. Spencer, a brother of the defendant, was engaged as her master for the season, for a certain share of her individual catchings. The complainant is therefore justly entitled to the account for which he asks, but if we should grant a decree to

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that effect it would be impossible for the defendant to comply with it. He has, by his own acts, placed it beyond his power to do so. When the vessel was left at Shantar Bay, in the fall of 1859, she had on board several boats, her sails, and a considerable amount of stores, being left in this condition with the hope, no doubt, that she would be thus found comparatively ready to resume whaling the following summer. Of the vessel and the property left on board of her, the complainant was part owner, but it is now impossible to ascertain the precise value thereof. During the winter a quantity of stores and materials were stolen from the vessel by the Indians, but how much does not appear with certainty. In the spring of 1860, the officers and seamen intended for the "Alice" went forward on the bark "Florence," upon whose articles they were all shipped, with the exception of the master. After the "Florence" arrived at Shantar Bay, two boats from her succeeded in reaching the place where the "Alice" lay, and in due time that vessel was got out into deep water and prepared for whaling. Men were sent from the "Florence" to navigate the "Alice," and during the season she whaled with three boats, under command of Joseph R. Spencer. Some of her officers and crew were changed from time to time by direction of the master of the "Florence," which vessel also supplied the schooner with provisions and other necessities, of which no account appears to have been kept. The greater part of the whales captured during the season, were secured by the boats which were lowered from the "Alice," a considerable part were cut in by her men, and one whale was tried out on board of her, but all the oil was put into casks on board of the "Florence." In short, the "Alice" was used as a tender to the "Florence," in violation of the original agreement, and it would be utterly impossible to adjust the accounts between the parties now, upon the basis of treating the "Alice" as an independent whaler for the season of 1860. We must accept the facts as they are, and under the stipulation of the parties already referred to, award such compensation to the complainant as may seem reasonable. The entire catchings of that season, with the exception of 819 gallons of oil sold in Honolulu for \$368 55, were forwarded to New Bedford for sale, and the net proceeds of the shipment, as

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evidenced by the account sales of Messrs. Swift and Allen, amounted to \$17,301 35, making the whole proceeds of the cruise \$17,669 90. After carefully weighing all the circumstances of the case, we award to the complainant the sum of seven hundred and fifty dollars as compensation under this branch of the case.

The last question presented for settlement is the claim of complainant for damages, for the wrongful conversion of his share of the "Alice," by the defendant, in the fall of 1860. It appears that after the close of the whaling season of 1860, the schooner was again left in Shantar Bay, for the winter, without complainant's knowledge or consent. After having used the schooner as a tender to the "Florence," during the season, the defendant's agents, instead of bringing the "Alice" back to Honolulu, hauled her up and secured her aground, on the 14th of September, at the same time burying on shore some provisions and sails appertaining to her, with the intention, apparently, of resuming the use of her again in the summer of 1861. It is averred on the part of the defendant, that the "Alice" was abandoned as being unseaworthy for a passage to Honolulu, after the close of the whaling season. But this is not proven to our satisfaction. On the contrary, we think the weight of evidence is in favor of her capability to have made the passage down, with an ordinary degree of safety, provided she had left the Ochotsk Sea early, as became a vessel of her class. We regard the acts of the defendant's agents as amounting clearly to an appropriation of the complainant's share of the vessel, and he is therefore justly entitled to the damages he claims. We award him as such damages the sum of three hundred dollars, with interest thereon from the 14th September, 1860.

Where parties transact business in the loose manner in which it has been done in this instance, it is impossible for a Court or jury to measure the pecuniary consequences with a degree of precision satisfactory even to themselves. But we have exercised our judgment deliberately, carefully examining and weighing all the facts of the case before us, and we deem it unnecessary to give a detailed exposition of the basis on which we have assessed the damages awarded to the complainant, under the several branches of the case.

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The master will ascertain the exact amount due the complainant, and a decree will be entered accordingly, with costs.

J. Montgomery and C. C. Harris, Esqs., for complainant.

A. B. Bates, Esq., for respondent.

January 9th, 1862.

SUPREME COURT—IN ADMIRALTY.

JOHN RICE *vs.* THOMAS SPENCER.

SEAMEN in the whaling business, before bringing a suit for their share of the proceeds of the voyage, are required to make a demand of settlement, and it is the duty of the owner or his agent to make out the accounts, the accurate knowledge of the data of settlement being with him and not with the seamen.

In the absence of any contract with the seaman, the lay should be the highest out of the port for good men in the same capacity.

The libellant having quitted the vessel during the cruise without reasonable cause, but at the same time with the acquiescence of the master, was held entitled to his share of the catchings in the proportion of the time he was engaged in the service to the whole time of the cruise.

It is a custom applicable to American whaleships, that in the absence of a stipulated price, the prices for the products of the whale fishery fixed by the American Consulate at Honolulu are to govern in the settlement of the voyages of seamen who ship to be discharged at this port.

ALLEN, C. J.

This is a libel for seaman's wages.

It is alleged that the libellant made an engagement with the respondent, owner of the bark "Florence," in the spring of 1860, at Honolulu, to proceed to sea and join said bark as boat-header as soon as he should fall in with her, but that no engagement in writing was entered into for his remuneration, but he was to have equal to the best, which the libellant alleges to be 1-18th of the entire proceeds of the voyage during the time libellant served on board said bark. In pursuance of this agreement, the libellant proceeded to sea in a vessel called the "Levi Starbuck," and joined the "Florence" at Saypan. It is further

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alleged that he did not sign articles, but it was understood that this port was to be the place of settling the contract. It is further alleged that he faithfully performed his duty till September 2d, when having had some disagreement with the mate, who threatened to leave the Florence, if he did not, and to avoid difficulties and any possible injury to the voyage, left the vessel, with the full concurrence of the master, and repaired on board the "Levi Starbuck," on which vessel he arrived in this port. The libellant further avers that the "Florence" was attended by the schooner "Alice," in both of which vessels he was entitled to a share. That the catch turned out at New Bedford 25,654½ gallons of oil, and 12,770 pounds of bone, the net sales of which was \$17,301 05, and that he is entitled to 1-18th of said proceeds.

The respondent admits that he fitted the "Florence" for a whaling voyage, and avers that on the application of the libellant, who was in want of labor for the support of his family, offered him a berth as supernumerary on said vessel, of which he gladly availed, and he proceeded to sea as alleged and joined the "Florence."

The respondent further admits that no articles or other agreement was signed, and that libellant went into the northern seas and labored in the service agreed upon, and that said "Florence" was attended by the schooner "Alice," and that the libellant is entitled to a *quantum meruit* for his services on both vessels, but denies that he is entitled to a share of the entire catch of the season, he having assisted only in the catching of a minor part. The respondent denies that he is entitled to an 1-18th lay of the proceeds of said voyage, or that he has ever asked for a settlement; but, on the contrary, the respondent avers that he has made repeated efforts for a settlement without success.

It appears in evidence that efforts at settlement have been made by the parties, but without success, from a disagreement in relation to the rate of compensation. I regard it the duty of seamen in this class of cases to make a demand of settlement and payment before a suit; but it is incumbent on the master, agent or owner, as the case may be, to make out the account according to the share of the amount of oil and bone taken, less

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the advances. The accurate knowledge of the data of settlement is with him and not with the seaman. If he makes such an account and presents it to the seaman, and tenders him a sufficient sum to cancel the amount, he will be exonerated; but when, as in this case, there is an unsuccessful effort at settlement, I regard it a full discharge of duty, a sufficient demand, and unless a tender is made by the other party, or some act done as is equivalent thereto, the seaman is rightfully in Court.

It is admitted that there was no written contract, and while it is alleged by the libellant that he was to have the best lay of any in port, it is averred by the respondent that he was to have a fair and reasonable compensation. It is to be regretted in all contracts, but especially in contracts of this nature, that they are not in writing; but the admiralty regard it more especially the fault of the master, and therefore always gives the benefits of any uncertainty to the seaman. It is contended that the libellant is entitled to the highest rate of wages paid at this port, as there was no contract in writing, and his counsel refer to the case of the "Crusader" (Ware's Rep., 437), which sustains this position. But it is maintained by the respondent that he was taken as a supernumerary, and therefore should have only a medium lay.

It appears by the evidence of Captain Long that he had employed the libellant in his ship, in the whaling service, for four seasons, and he gave him one-eighteenth lay and \$24 per barrel for oil and bone taken; that he was one of the best men in that service. He says further that on the 17th day of July he went on board the "Florence," in the Ochotsk Sea, and having an inefficient mate on board his own ship, he made application to the master, Captain Spencer, for the libellant, but from some cause not stated he did not engage with Captain Long. He says he should have given him the same lay as before. It is clearly proved that he rendered efficient service, having taken five of the thirteen whales taken by the "Florence" and the schooner. It is further in proof by Captains Waterman and Green, gentlemen of experience in the business, and acquainted with the libellant as a whaleman, that he would be entitled to one-twentieth lay of both ships, and to be paid off at the Consular prices, if there was no agreement for other terms. It is

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clear, in the mind of the Court, that he merits the highest lay of any of that class of men out of the port, which is one-eighteenth.

The next question which arises is, where is the place of settlement? It is alleged that it should be made here, where the agreement for service was made, and there being no proof to the contrary, I should regard this as the proper place, because the cruise terminated here, and especially as he had made no legal contract he was entitled to leave the vessel here, and with this I do not see the propriety of the allegation that the libellant should be paid his lay in the net proceeds of the oil and bone at New Bedford. It is alleged that Honolulu was to be the place of settling the contract; if so, it is very clear that the settlement was to have been made as soon after the arrival of the ship as the settlement of the voyage could be made up. As the case appears, the master and owners of the "Florence" are responsible for a settlement here, and had the oil been lost on the passage to New Bedford, the libellant would probably have thought a singular construction of his agreement that he should bear the loss, and be answerable for the advances he had received. The Court is clear in the opinion that in the absence of a contract, and where a cruise is made, the lay should be the highest out of the port for good men in the same capacity, and that the payment should be where the cruise terminates.

It appears in evidence that the libellant did not join the "Florence" on her departure from this port, but sailed from here for that purpose on the 12th January, 1860, and although there is some discrepancy in the testimony in relation to the time when he left the vessel, the weight of testimony is that it was on the 2d day of September. Had the respondent thought proper to present the log-book, perhaps more accuracy might have been attained. The fourth mate, who was attached to the schooner, testifies that he was on board the ship the last of August or beginning of September, and the libellant was on board the ship at that time, and that when the schooner was hauled up he went on board the ship, which was the last of September, and Mr. Rice was not there.

It is contended that he should have his lay for the time he

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was engaged in the cruise, and the additional time required to make the voyage from the Sea when he left the ship to this port. It is in evidence that there was a disagreement between the libellant and the mate of the "Florence;" each complained to the Captain and expressed a desire to leave, but the Captain said to the libellant that he had better remain and go on in his work as before, and it would all be right. He did not refuse him liberty to leave; and the only question is whether there was such a course of treatment as justifies a man in his capacity leaving the vessel, and yet claiming pay for the balance of the cruise. There was no severity from the master, and no oppressive conduct on the part of the mate. It was merely an unpleasant difference with him. I think the Captain should have settled the difference for them, but as he did not interfere, the libellant thought proper to leave and join the "Levi Starbuck" for the remainder of the season. On what terms he joined this ship does not appear—he may have earned wages on that vessel. Be that as it may, it is not in evidence that there was any necessity for his leaving the "Florence;" it was a matter of feeling; he preferred another vessel, as is often the case. As the master did not object to his leaving, he is entitled to his earnings while engaged in the service of the ship, but no longer.

It is contended further, that he should only be entitled to his lay in the catchings while he was on board. There is usually in the shipping articles a stipulation to that effect. In the whale-fishery, by the terms of the usual articles, the legal representatives of a mariner, dying during the voyage, are entitled to such part of the whole amount of his stipulated share as the time of his services on board shall be of the whole term of the voyage.

Whether it is in the shipping articles of the "Florence" I do not know, as they were not produced. The service commences when the vessel leaves port, and it continues as long as the seaman is on board. Catching the whale is only a part of the service, and frequently much less severe than in taking care of the oil and in aiding in the general management of the ship in heavy weather; valuable time is consumed in the necessary service of reaching the fishing ground. There are

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other considerations which favor payment according to the time of service on board in the absence of any agreement. The contract of the whaler is based on mutual aid, not on individual effort, while it is designed to enlist the generous co-operation of all on board.

In this business the ship, with her supplies and outfits, the master and officers and men are all requisite for its success—all by their contract, whether expressed or implied, are bound to contribute for the general object. There may be, at times, great success for a few weeks, and none whatever for months, although all are laboring with equal assiduity for that purpose. Indeed, most of the whales in the northern sea are taken within a period which is usually not more than half the time consumed in the whole cruise. At times it would operate very advantageously for the seaman, but then he would be receiving money for which he had not labored or expended his time. I am aware that there are many cases where men are engaged at sea when the parties are employed in this labor, and are paid according to the amount taken while on board. But this is by special contract, and in such cases the seaman has usually worked his passage there. But, as a principle, I know of no provision more equitable than that contained in the shipping articles of most, if not all, of the American ships in this service. Therefore the libellant is entitled to his share of the catchings, in the proportion of the time he was engaged in the service to the whole time of the cruise.

Had the libellant left the ship for cause, he would have been entitled to his lay for the whole cruise, or had he left her without cause and against the consent of the master, he would not have been entitled to any portion of his lay; but exercising his preference, and with the acquiescence of the master, I regard a just compensation due him, according to the time he was virtually attached to the ship.

Although he did not leave this port for about one month after the "Florence" had sailed, yet I am satisfied, from the evidence, that he had entered into an engagement to ship in her before she sailed, and this liberty to remain at home for a while was doubtless given as a matter of accommodation to libellant, with the full understanding that he should join her in season

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for the whaling service, and had he returned in the vessel there would have been no pretence for curtailing his lay on account of this delay in sailing. It was equally well for the voyage, as far as appears, that he joined the "Florence" at Saypan, as at Honolulu. Therefore, I am of the opinion he is entitled to his proportion of the catchings, which the time bears from the day of the sailing of the "Florence" to the 2d day of September, when he left her, to the whole time of the cruise.

This will be about the ratio as contended for by the respondent. The next question which arises is the price of oil and bone at which a seaman should be paid, when there is no agreement, as in this case.

The libellant alleges he should be paid his lay in the net proceeds of the catchings at New Bedford. If the contract was for the voyage, which was to terminate there, and the seaman completed it, then, of course, this would be the proper basis of settlement, but as the contract was made here and terminates here, the seaman is legally entitled to be paid here. Any other rule than this would be oppressive upon the seaman in most cases, and wholly contrary to his expectations when entering on the service. If, then, this is the case, at what price of his share in the catchings should the settlement be made in the absence of an agreement? The testimony of Messrs. Waterman and Green is that when there is no stipulation the understanding is that payment should be made at the Consular prices of the oil and bone taken. I regard this as a custom as applicable to the American ships, that in the absence of a stipulated price, the prices fixed by the American Consulate are to govern. When a man ships, or agrees to ship, on an American whale-ship, it is universally understood that he is to be paid off at these rates. The share, or lay, is fluctuating, but the price is fixed for the season's catch. The object and intent of the law in giving the highest rate of wages out of the port, when no contract in writing is made, is to secure the seaman his rights as well as in a well-defined contract. But in the American whaling service the price is certain, as fixed by the American Consul at this port.

The master will make up the account according to these principles, with interest on that amount from December 1st, 1860,

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the vessel having arrived on the 19th of November, which gives a reasonable time to make a statement of the account, unless for special reasons more time is necessary, which, it is not alleged in this case, was required; and, also, with interest on the payments made by respondent from the day of their date, except on the first two items, amounting to \$120, which I regard as a seaman's advance.

C. C. Harris, for libellant.

J. Montgomery, for respondent.

SUPREME COURT—IN EQUITY.

F. L. HANKS vs. P. S. WILCOX AND CHARLOTTE COADY.

ONE of the partners of the firm having rendered extraordinary services in winding up the affairs of the concern, consequent upon the death of a partner, and during the absence of the third or remaining partner in the United States, a remuneration for extra labor, not in the nature of a commission, but as for extra expenses incurred, was allowed.

Justice ROBERTSON delivered the judgment of the Court as follows:

An order of reference was granted by the Chancellor, in this cause, directing J. E. Barnard, Esq., one of the Masters in Chancery, to take an account, in order to ascertain and report what amount, if any, is due to, or owing by, each of the parties composing the late firm of Richard Coady & Co., of Honolulu; and also to ascertain what amount, if any, is due to the complainant Hanks, in the nature of a *quantum meruit*, for extra services said to have been performed by him in closing up the business of the firm.

The Master reported in favor of the complainant's claim for compensation, as for extra services, and placed to his credit under that head, in making up the accounts, the sum of \$4,938 51 (less \$1,500 previously credited to Mr. Hanks on the books,) being a commission of five per cent. upon \$98,770 23, the amount of business liquidated by Mr. Hanks, in winding up the

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concern, from January 1st, 1859, to May 5th, 1860. To this part of the Master's report exception was taken, in due course, by the respondent Wilcox—the other respondent, as the representative of the deceased partner, admitting upon her part that Mr. Hanks had devoted much time to closing up the business, and that she considers him entitled to a reasonable recompense.

It is contended by counsel for Mr. Wilcox, that under the well understood principles which are everywhere held applicable in relation to the rights and duties of surviving partners, upon a dissolution of partnership by death, Mr. Hanks is not entitled to any remuneration whatever, for assistance rendered by him in winding up the affairs of the late firm, of which he was a member. We think there can be no doubt of the general soundness of this doctrine. Counsel for the complainant admits, that by the ordinary rule of law a partner is not allowed to charge compensation for any services rendered by him, in prosecution of the partnership business, while the partnership continues in active existence ; and we think the same rule generally holds good in relation to services performed as well after a dissolution as before. It was the duty as well as the right, of the surviving partners of the late firm of Richard Coady & Co. to wind up the partnership business after the death of Mr. Coady, to close all pending operations, to settle with the creditors and debtors of the firm, and to account with the lawful representatives of their deceased partner for his share of the capital and profits. For the services rendered by the surviving partners, in so winding up the affairs of the firm, neither of them is entitled to any remuneration, unless there was an express stipulation to that effect, or unless the services performed by him were of such a nature, or were performed under such circumstances, as will necessarily raise an implied understanding that he should be paid. (See Collyer on Part., p. 192, sec. 199, and note 3 ; Story on Part., sec. 331, and note ; Kent's Com., vol. 3, p. 72, note a ; U. S. Eq. Digest, vol. 2, p. 405, secs. 389, 390, 393 ; p. 406, secs. 400, 405.)

There is no evidence in this case of an express agreement on the part of either of the respondents to pay the complainant for any services performed by him after the dissolution ; and

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it is contended that he was bound by the terms of the copartnership deed to render all the assistance which he did render without extra compensation ; in other words, that he merely did his duty. It appears, by reference to the articles of copartnership, that the entire real capital of the firm was furnished by Messrs. Coady & Wilcox, Mr. Hanks contributing only his time and labor. The articles contain the following clause : " It is understood that Frederick L. Hanks is not possessed of any capital, but is to devote his services as book-keeper and accountant of the firm, and is to pass in any funds which he may hereafter receive from proceeds of voyage of bark "Black Warrior," or otherwise." It is argued that this stipulation continued binding upon Mr. Hanks after the dissolution, and that he was thereby especially bound to keep the books and accounts until the affairs of the firm were finally closed. In our opinion this is not sound. Mr. Coady died in the month of June, 1858, and his interest in the concern ceased, by express provision of the articles, on the first day of January, 1859, which is regarded, for the purposes of this proceeding, as the time of final dissolution. At that date, we hold, the stipulation which bound Mr. Hanks to keep the books and accounts, and made his skilled labor in that behalf a substitute for the contribution of money capital, ceased to be binding upon him. Any stipulation contained in the articles, engaging either of the partners to conduct a particular part of the business, must have ceased to be binding after the dissolution, unless the contrary was expressed or could be clearly implied. The chain once broken, the separate links, or members, were dismissed to their rights under the law merchant, and Mr. Hanks is as much entitled to the benefit of this consideration as either of the other partners. It then became the common duty of both the surviving partners alike, under the rules of law which govern the position in which they were placed, to close up the business of the firm ; and neither of them was bound to take upon himself exclusively the discharge of any particular branch of the necessary operations. To prove this, we may suppose that the partnership had become dissolved by the death of Mr. Hanks, instead of Mr. Coady. In that case Mr. Hanks' representatives could not have been deprived of his share of the profits on the ground that he had

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not fulfilled his part of the partnership agreement. So, neither of the survivors, in particular, would have been bound more than the other to devote himself to the keeping of the books and closing up the accounts. The same result, legally speaking, must follow upon a dissolution caused by the death of any of the partners. That result could only have been prevented in the present instance by an express stipulation to the effect that, if the partnership should be dissolved by the death of any partner, other than Mr. Hanks, he should still continue to keep the books and accounts until the affairs were finally closed.

The question is then, did Mr. Hanks render extraordinary assistance in the winding up of the partnership business, and as there was no express agreement to pay him for extra services, did he perform services of such a nature, or under such circumstances, as create an implied agreement that he should be paid therefor? It appears in evidence that Mr. Coady, the leading member of the firm, died suddenly at sea, on his way to San Francisco, on the 18th of June, 1858, within six months after the commencement of the partnership, at which time the other partner, Mr. Wilcox, was also absent from Honolulu on a visit to the United States. Mr. Hanks continued to be the only member of the firm here until the return of Mr. Wilcox in the middle of September following. From the final dissolution of the partnership on the 1st of January, 1859, up to August 30th of the same year, Mr. Hanks continued to devote his time to the winding up of the business. Mr. Wilcox having again left for the United States in the month of April. On the 30th of August, 1859, Mr. Hanks formed a new connection in business, but still continued to bestow such attention as was necessary to closing up the affairs of R. Coady & Co. till the month of May, 1860. The business carried on by Richard Coady previous to the formation of the partnership, became merged in that of the firm, increasing the labor thrown upon Mr. Hanks, in closing accounts and effecting settlements, and it probably required as much time and labor to wind up the partnership at the end of one year, as if it had lasted four years, as originally contemplated. It is said that in becoming a member of the firm under the stipulation already referred to Mr. Hanks must have understood what was expected of him,

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and that he took the risk of the partnership being determined before the time limited in the articles. This is true ; but we have already stated that that stipulation died with the partnership itself, and it is clear that had Mr. Hanks merely done what the law required of him, after the dissolution, a receiver must have been appointed at the expense of the estate, or else Mr. Wilcox would have been under the necessity of remaining constantly in Honolulu. In our opinion, therefore, Mr. Hanks did render extraordinary assistance, under such circumstances as make his claim for compensation a fair subject of consideration for the Court.

The last question to be determined is, what amount of compensation shall be allowed ? It is objected by counsel for the contesting respondent, that Mr. Hanks' remuneration should not be measured by a commission. We think the objection is a good one. The same mode of payment which might have been considered proper, in the case of a stranger acting as receiver, should not be adopted in paying Mr. Hanks, a member of the firm. It was his duty to assist in closing up the business of his firm, and the special reward that is to be allowed him should not exceed a bare remuneration for his extra labor, it being in the nature of an allowance for extra expenses incurred. It has been argued with much force, that when Mr. Hanks charged the concern with fifteen hundred dollars, as paid to himself, on the 14th of November, 1859, for services rendered after the dissolution, he himself measured the value of those services. From the wording of the entry, as it appears upon the books, we are inclined to think that Mr. Hanks, at that time, did look upon the sum so charged, as all that he should receive. But apart from this consideration, the Court feels that in allowing him that amount, it does what is just and equitable towards all parties interested.

The exception to the master's report is therefore sustained, to that extent, and the sum of \$1,500 only will be credited to the complainant, under the head of extra services. .

Mr. Montgomery, for complainant.

Mr. Harris, for Mr. Wilcox.

Mr. Austin, for Mrs. Coady.

March 6, 1862.

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SUPREME COURT—IN EQUITY.

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GENERAL demurrer to the bill ; that at the early settlement of these Islands by foreigners, there was no law of inheritance : overruled—the Court being of opinion that there was a common law of inheritance liable to be modified or defeated, but perfectly good until such an event.

An inheritance recognized by the King, as alleged in the bill, would be valid.

A tenant can neither deny his landlord's title in ejectment, nor set up an outstanding or paramount title in himself or a third party ; but he must first restore the possession which he obtained from his landlord, and then as plaintiff, he may avail himself of any title he may have acquired.

General demurrer overruled, when there is any equity in the bill.

An eviction under a paramount title must take place before the lessee or grantee can avail himself of it as a defense on his own contract.

ALLEN, C. J., delivered his decision, overruling the demurrer taken to the amended bill, as follows :

It appears by the bill that Kalaimoku entered into an agreement with the respondent in which he assigned to him, his heirs, executors, administrators and assigns half of the wharf called the King's wharf, situate in Honolulu, and that said respondent for himself, his heirs, executors, administrators and assigns, agreed to pay half of all expenses incurred in altering, repairing and improving said wharf, and to pay Kalaimoku, his heirs, executors, administrators and assigns one-half of all the moneys received for the use of said wharf and premises, and said Kalaimoku agreed to pay half of all the expenses incurred in altering, repairing and improving said wharf.

The agreement bears date January 11, 1827.

Said respondent, in pursuance of said agreement, entered upon the premises, and has continued to occupy them till the day of filing the bill. And the bill further alleges that the respondent presented to the Board of Land Commission a claim based on the above recited agreement, and the following record and award was made, (the said) respondent having set forth that he was deprived of a portion of the land supposed to be included in the agreement referred to ; and His Excellency, Mataio Kekuanaoa, at that time acting for the heir of Kalai-

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moku, having agreed to add to the portion described thereafter as Part 1st, that described as Part 2d: "We accordingly confirm the claimant James Robinson, his heirs, executors, administrators and assigns, in the same rights and privileges in the lot 'commonly called the Point,' and now including the additional piece under part No. 2, as they are both designated in the surveys of T. Metcalf, as set forth in the award, as were granted in the original conveyance, and given in full in this award, and subject at the same time to the same rules and conditions as are therein contained"—the whole instrument, as quoted, being now confirmed by this Board, in full application to the present claim, and correctly described in surveys of Part 1st and 2d.

It is further alleged in said bill, that said Kalaimoku deceased, about October, in the year 1827, leaving as his sole heir his son Leleiohoku, who inherited the property described in the agreement, and was acknowledged to be the heir of Kalaimoku by the King, and was treated and considered as the inheritor of the above described property by the said respondent; that the said Leleiohoku was lawfully married to said complainant, and deceased intestate in the year 1848, leaving his son John Pitt Kinau, the son of complainant, his only heir, who thereupon became entitled to the property thereinbefore described; and there had been allotted to complainant, as her dower, or a portion thereof, the lot described in Part 2d of said survey of T. Metcalf, and who held possession thereof from her said husband's decease, until the arrangement made as set forth in 1851, by the record of the Land Commission; and that said John Pitt Kinau deceased, in the year 1859, being still a minor, that complainant, his mother, was his only lawful heir, and became entitled to his entire property, and is the inheritor of the property described in the bill.

The complainant avers that there has been no settlement, as she verily believes, or account rendered, although she admits that small sums have, from time to time, been paid and that a large sum is now due.

To this bill there is a general demurrer: 1st, on the ground that there were not at the time of the death of Kalaimoku, any inheritable estates in the Kingdom, and therefore his son, Leleiohoku, could not have inherited the estate in question.

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2d. The title to land in this Kingdom is founded upon a Land Commission Award, a Royal Patent, or the Mahele (division) Book of 1848.

It appears by the bill that Leleiohoku was the son and only heir of Kalaimoku, and that he inherited the property, and was acknowledged to be the heir of Kalaimoku by the King, and was treated and considered as the inheritor of the property in question, by the respondent himself. It appears further, that Leleiohoku was lawfully married to the complainant, and that he died intestate in the year 1848, and leaving his son, John Pitt Kinau, the son of the complainant, his only heir, who, therefore, became entitled to the property in question.

And it is further averred by the bill, that John Pitt Kinau, deceased, in the year 1859, being still a minor, and that the complainant, his mother, was his own lawful heir, and became entitled to his entire property, and is the inheritor of the property referred to.

It appears further, on the application of the respondent, that the rights of the parties under the contract were recognized and confirmed by the Land Commission in 1851, at which time a separate piece of land, called Lot No. 2 in the survey, was recognized as included in the contract, in lieu of a portion of the King's wharf, which had been taken possession of by the Government.

But it is said there was no law of inheritance at that time. I am of opinion that there was a common law of inheritance, liable to be modified or defeated, but perfectly good until such an event. Therefore, by the bill, the title in Leleiohoku was complete.

I suppose that an inheritance recognized by the King, as alleged in the bill, would be valid at that time, even upon the theory of the counsel for the respondent.

As to a right of inheritance at that time, the agreement itself recognizes it. The respondent admits, by his agreement, that there was at that time a right of inheritance, and it is averred he held under Leleiohoku till his death, and he recognizes again the heirship of Kinau, the son of Leleiohoku, and his rightful heir.

The respondent admits, by the demurrer, the agreement and

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the occupancy ; and that he made a claim before the Land Commission for an award based upon the agreement, and that the Land Commission did confirm the claimant—the present respondent—his heirs, executors, administrators and assigns, in the same rights and privileges in the lot called the Point, with the additional piece substituted for a portion of the original lot, called “The King’s Wharf,” as was granted in the original conveyance and given in full in the award, and subject at the same time to the same rules and conditions as are therein contained, the whole instrument being confirmed, in full, on application to the said Board. In a word, the respondent, in pursuance of the agreement already adverted to, entered into the possession of the land, and enjoyed the same for more than thirty years, and recognized by his acts the son and heir of the original party to the agreement, and after some twenty-four years of uninterrupted possession, appeals to the Board of Land Commission to have his rights confirmed under the agreement, and by mutual agreement, receiving the possession of a lot of land allotted to the complainant, as dower, in lieu of a portion of the King’s wharf—the land referred to in the original agreement—which was done by the Board in 1851, since which time he has continued in the same uninterrupted possession, enjoyed without let or hindrance.

When a vendee obtains and keeps possession of land under a contract of sale, which is not fulfilled, he will be estopped from setting up a defect in the title, as a defense to an ejectment by the vender, or on a suit for the purchase money.

Jackson & Hotchkiss (6 Cowan, 401), in *Galloway vs. Turley* (12 Peters, 264), it was held that a vendee who has gone into possession, under the vender, is virtually in the position of a tenant, and will not only be precluded from using the defects in the vender’s title to deprive him of the land without paying for it, but will be compelled to make any steps which he may have taken to complete the title, subservient to the purposes of the contract, instead of a means of defeating it.

In *Chattel & Pound*, 1 Lo. Raymard, it was decided that although the tenant may plead *nil habuit in tenementis* to an action of debt for rent, he must fail at the trial if the landlord shows any interest, although limited to an estate at will, or a bare possession.

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It is regarded now as the settled doctrine in England and the United States, that a tenant can neither deny his landlord's title in ejectment, nor set up an outstanding or paramount title in himself or a third party.

Philar & Kelly, 25 Wend., 392; in Jackson & Harper, 5 Wend., 246, the tenant set up an outstanding title in a third person, holding directly by letters patent from the State, in an action of ejectment against him, by his landlord, but the Court ruled that he was estopped from contesting the title under which he entered, as against his original landlord, or any other person who has acquired or succeeded to his title. He can no more show that the premises belonged to the State, than he can that this belonged to himself. In this case, letters patent from the State were produced, and a lease of the premises by the patentee to the defendant, still the Court ruled that he must first restore the possession which he had obtained from his landlord, and then as plaintiff he may avail himself of any title which he has been or may be able to acquire. In this case no paramount title has been set up.

The estoppel is not limited to the original parties to the lease, but extends to all who come in under the tenant, or take by descent, or purchase from the landlord.

Lord Kenyon, in the case of *Cook vs. Laxley*, 5 T. R. 5, ruled that in an action for use and occupation, it ought not to be permitted to a tenant, who occupies land by license of another, to call upon him to show the title under which he let the land; and the only question is, whether in this case, as in that, the same principles apply. Here the respondent entered into possession of the premises by an agreement with Kalaimoku, from whom by inheritance, as the complainant alleges, the estate has descended to her son, and at his death, to his mother, and he now refuses to fulfill the terms of the contract under an idea that he may contest the plaintiff's title. It is a general rule that the tenant shall not dispute the landlord's title, and no exception to it has been shown as applicable to this case.

Judge Wilde, in the case of *George vs. Putney* (4 Cush., 354), says that so long as the lessee is not disturbed in his occupation, he is bound by the contract to pay the rent, whether the lessor's title be defective or not.

It is equally clear that if the lessee is disturbed in his possession by a party having a paramount title, he is not liable. Any act equivalent to an ouster, is a defense of payment.

As the party cannot contest the title under which he holds, neither can he the title of the heir. The bill alleges that Kalaimoku died in 1827, leaving as his sole heir his son Leleiohoku, who inherited the property described in the agreement, and was acknowledged to be the heir of Kalaimoku by the King, and was treated and considered as the inheritor of the said property by the respondent.

The full Court ruled in a demurrer to the bill before it was amended, that a party cannot controvert the title under which he holds an estate, and the same principle applies to the heir when the lessor dies during the term, unless deprived of possession derived from his lessor by a paramount title, or when he was induced to accept possession from his lessor by fraud or mistake, and from some other exceptional causes, none of which have been shown as applicable to this case.

The Court said that the party is not permitted to question the title under which he holds by virtue of the contract. The rights of the parties by the bill are in question, and not a title adverse to the complainant. The Court feel it their duty to observe that these objections do not come with great force from a party who has been in undisturbed possession for thirty-four years, and especially when the contract was formally recognized on the respondent's application by the Land Commission as applicable to the "King's Wharf," and when the complainant herself appropriated a portion of land allotted to her as dower to make up for a portion of the land taken for Government uses from the "King's Wharf."

It is an admitted principle of equity pleading that if any part of a bill is good, that a general demurrer to the whole bill cannot be sustained. The universal rule in Chancery is that the defendant may meet the plaintiff's bill by several modes of defense. He may demur, plead, answer, and disclaim; but if he demurs generally, when there is any equity in the bill, or when he should have plead or answered any of the allegations, or should have disclaimed, the demurrer must be overruled.

It is a matter of history that when the islands were conquer-

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ed by Kamehameha I., he divided a portion of the lands among his warrior chiefs, and they divided the lands entrusted to them to inferior chiefs, by whom they were sub-divided again and again. All these persons were considered to have rights in the lands, or the productions of them; all persons possessing landed property paid a land tax to the King, which he assessed at pleasure, and also service, which was called for at discretion. The superior always had the power at pleasure to dispossess his inferior, but it was not considered just and right to do it without cause, and dispossession did not often take place except on the decease of one of the landlords, when changes were often numerous, and the rights of heirs and tenants comparatively disregarded. It is very clear that heirs were recognized, and their rights continued until they in some mode were declared forfeit. The Act of 1839 was designed to give additional protection to the persons of all the people, together with their lands, their building lots, and all their property. It is expressly declared that the landlord shall not causelessly dispossess his tenant, and the law of inheritance was expressly recognized. But the Laws of 1839 and 1840 were not regarded as an adequate protection, and it was found necessary to adopt a new system for protecting rights when ascertained, and to accomplish this object the Land Commission was formed. "The whole power of the King to confer and convey lands to which private and equitable claim now attaches, is reposed in the Commission. It had reference to his private or feudatory right as an individual participant in the ownership." This is the language used by the Board of Land Commissioners. So that when they made the confirmation as set forth in the bill, there was a clear recognition of the validity of the agreement, and the rights of the parties under it.

I will refrain from noticing in detail the very elaborate and ingenious argument of counsel for the respondent, for the principles of law which I regard as applicable to the case, render it unnecessary.

1st. The respondents cannot contest the title of Kalaimoku, as they are the parties to the agreement.

2d. Nor the title of his heir, who is alleged to be his son Leleiohoku; and that he was recognized by the King as the heir; and by the common law of that day could inherit.

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3d. Nor can he contest the title of John Pitt Kinau, who is alleged to have been the son and only heir of Leleiohoku ; nor the title of the complainant, the mother, whom it is alleged to be his lawful heir, and become entitled to his entire property.

The respondent, by plea, may deny the truth of the allegations of the bill, viz : That the several persons named in succession were the heirs, but admitting the allegations, the demurrer must be overruled.

Even if the Government had rights in the land, and the Land Commission award was of no value, the respondent cannot avail himself of it as defense on his own contract until an eviction takes place. The Government may think proper not to assert any claim. It would be repugnant to every principle of law from the earliest times, as well as every principle of justice, that the tenant should put forward his apprehensions as a defense of payment. The counsel for the respondent do not seem to appreciate the distinction between his legal rights of defense in this case, and in the suit of a stranger against him for possession. In the latter case, their reasoning would apply, and they might well say we require evidence of a Land Commission award, or a Royal Patent, but he has recognized the complainant's title under which the complainant by his contract claims, and it is not competent for him to deny it, as long as he continues in undisturbed possession. The paramount title must be enforced, and even were this done, there is an equity in the bill for a certain portion of the income, if not for all, and the complainant has equity in her claim, arising from the lot she substituted in her own right, in lieu of a portion of the King's wharf taken by the Government. Whatever legal ground respondent may have to defeat the present bill by plea, it is very certain that a general demurrer cannot be sustained. It is therefore overruled with costs.

Messrs. Harris and Davis for complainant.

Messrs. Bates and Montgomery for respondent.

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IN the year 1827 there was no fixed or uniform law of inheritance, such as has existed for the last twelve or fifteen years; and, although the fact of a general transmission of the possession of lands seems well established, yet such transmission was not governed by well defined rules or uniform custom.

The complainant, as the representative of the original owner of the premises in question, not having ever obtained a Land Commission Award of the said premises, was considered as entitled to a fee simple patent from the Government upon payment of the usual commutation, said patent to be based upon the award made in favor of her co-tenant and bailiff.

Under the agreement made by the respondent with the ancestor, by which the respondent should occupy and improve a certain wharf premises in Honolulu and account and pay over one half of all the monies received for the use of the said wharf and premises to the original owner, his heirs, etc.—one half of the expenses in repairing, improving, etc., to be borne by each; the respondent was regarded as a co-tenant. Also, having recognized, for thirty-four years, the successive heirs to the property and those claiming an interest by making payments to them from time to time, and suffering no disturbance in his possession, the Court refused to adjudicate upon what might be the rights of the Government or any third parties—no such counter claims being before the Court—and the heirship of the complainant having been proved, the respondent was decreed to account to her for all the monies received for the use of the said wharf and premises.

ALLEN, C. J.

The bill and answer in this case have been so fully set forth in the decision, which has hitherto been given by the Court on a demurrer to the bill, that I regard it unnecessary to present them in full again, and will only refer to them in discussing the positions taken by the parties.

The execution of the agreement of the 11th of January, 1827, by and between Kalaimoku and the respondent, which is set forth in the bill, is admitted; and further, that the respondent, in pursuance of said agreement, entered into possession of the premises as tenant in common with Kalaimoku, and has continued to occupy a portion of the premises till the time of filing the amended bill, and avers that the other portion has been taken possession of by the Governor of Oahu for the use and benefit of the Hawaiian Government.

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It is specially alleged in the bill that the respondent presented to the Board of Land Commission a claim based on the agreement of the 11th January, 1827, in which he set forth that he was deprived of a portion of the land supposed to be included in said agreement, and that His Excellency Mataio Kekuanaoa, acting for the heir of Kalaimoku, having agreed to add to the portion described in said bill as Part No. 1, that portion described as Part 2; that the said Board confirmed the claimant, the present respondent, his heirs, executors, administrators and assigns, in the same rights and privileges in the lot commonly called the "Point," and now including the additional piece under part No. 2, as they are designated in the survey set forth in the bill, as were granted in the original agreement and given in full in the award, and subject at the same time to the same rules and conditions as are therein contained; that the agreement was confirmed by the Board in its application to the claim as presented. It is alleged that the agreement by which Part 2d was substituted for whatever ground may have been taken from that included in the agreement of the 11th January aforesaid was made during the year 1851, and that, in pursuance thereof, the respondent entered upon the second part, and continued to occupy the same till the day of the filing the bill, and has received large sums of money and profits for the use and occupation of lots No. 1 and 2.

The counsel for the respondent says "that they admit the presentation of the claim based on the agreement, and that the Board made an award;" and that they set forth all the proceedings had therein, but deny entering into any agreement with Kalaimoku or his heirs, other than the original one dated 1827, in relation to the premises described therein.

It appears by the award and by all the testimony having reference to it, that it was claimed and rendered by virtue of this agreement. It further appears that the present respondent claimed an equivalent, on account of some infraction of the original agreement, which caused a long suspension of the case. At length there was a final settlement by mutual concession, satisfactory to both parties concerned—the representative of the grantor, M. Kekuanaoa, with the approval of the Hawaiian Government, consented to an addition of a piece of ground to

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the original lot, in lieu of the alleged deprivation ; and there appearing no counter claimant, this modification of the agreement was made. Whereupon the Board confirmed the respondent, his heirs, executors, administrators and assigns in the same rights and privileges in the lot commonly called the "Point," and now including the additional piece under Part 2, as they are both designated in their metes and bounds by a survey of T. Metcalf—as were granted in the original agreement, and subject to the same rules and conditions as are therein contained ; and that said instrument is confirmed by this Board in full application to the present claim, and correctly described in the surveys of Part 1 and 2, as set forth in said bill.

It is admitted that all the claim the respondent had to present to the Land Commission, was based on the agreement of Kalaimoku ; and it is equally clear that he made an effort to obtain an equivalent for the portion of land which had been added to the fort. This caused some delay in the proceedings ; but at length an agreement was made by the representative of the grantor, Kekuanaoa, with the consent of the Hawaiian Government, that a piece of ground, which is called Part No. 2, should be added to the original lot, in lieu of the alleged deprivation ; and the award was made accordingly. It is alleged in the award that "obstructions to a final settlement were removed by mutual concession, satisfactory to both parties concerned." Who were these parties, but the claimant for the award under the agreement, the present respondent, and M. Kekuanaoa, the representative of the heirs of the grantor ?

What moved the Board to include in an award to the claimant a piece of land not included in the original agreement, unless it was to satisfy him for the piece of which the parties to the original agreement had been deprived ? Is it not equally clear that he complained of the heirs of Kalaimoku, and claimed that they should make an equivalent to him for the injury he had suffered by the loss of a piece of the land included in the original agreement ? Unless there was a clear understanding between those parties, why was it that the Board declared in their award that the terms and conditions of the agreement should apply to lot 2, as well as to the original lot called by them lot 1 ? It is in evidence that on the fourteenth day of

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June, 1850, an agreement was made and executed by and between John Ii, the guardian of John Pitt Kinau, the son and heir of Leleiohoku, and Keelikolani, his mother, and the widow of Leleiohoku, for a settlement and division of their respective interests in the real property of said estate, in which the widow relinquished her right of dower in certain lands therein specified, one of which is that part of Pakaka in the possession of the respondent, makai of "the stone wall." The consideration for this relinquishment of dower was that she should enjoy the entire use of certain other lands during her life, one of which is that part of Pakaka situated mauka of the "stone wall." At that time the guardian of the minor was authorized by law to make the agreement.

It appears in evidence that M. Kekuanaoa is the father of complainant, who was then a widow of Leleiohoku, and who held No. 2 as an allotment of dower, and that she was the mother of John Pitt Kinau, who claimed to be the heir of the rights of his father Leleiohoku, in Lot 1, called the "Point," and in the agreement with the claimant before the Land Commission.

It is reasonable to suppose that M. Kekuanaoa would have represented his daughter and her son before the Board to make the best efforts in his power to repair any injury which had arisen to the parties to the original agreement, by being deprived of a part of the King's Wharf. By those who claimed to have inherited all the rights that Kalaimoku had in the King's wharf, and by virtue of the original agreement, this consideration was given, and a modification was made in the agreement, in the nature of an additional article. It is very evident that the award of lot No. 2 was made expressly on the surrender of the claim of Keelikolani, and as the Board say, in lieu of what had been taken from the original lot as described in the agreement. All the rights which the respondent asserted before the Land Commission, were derived from the agreement with Kalaimoku for lot 1, and the agreement made before the Land Commission with his representatives for lot No. 2.

It is further alleged in the bill, that Kalaimoku died in October, 1827, leaving as his sole heir his son Leleiohoku, who inherited the property described therein; and that he was ac-

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known to be the heir by the King, and was treated and considered as the inheritor of the said property, by the respondent. The respondent admits that he did regard Leleiohoku as having the inheritance as alleged; but avers that he has good reason now to believe that he may have been in error in so treating and considering said Leleiohoku, as he has been informed, and verily believes; that another than Leleiohoku, claimed to be the heir of Kalaimoku, to whom was granted the entire charge of his estate after his decease, in the presence and with the approval of his late Majesty Kamehameha III.

The counsel for the respondent say, that the first material allegation in the bill which they deny, except what is not refuted by all the proceedings of the Board of Land Commissioners, is that Kalaimoku deceased, leaving Leleiohoku his sole heir. They admit that it is proved that Leleiohoku was the only son of Kalaimoku, by his acknowledgment, and by common repute, and that if there was a law regulating the descent of an ancestor's estate to his son, or child of his body, to the exclusion of all others, Leleiohoku has been proved to be the heir of his father's estate—still they insist that there was no certain fixed rule of the descent of property, and that the Court can not administer justice except on fixed rules. The Court have hitherto examined this question, and while they have given an opinion that there was a common law of inheritance, liable to be modified or defeated, but perfectly good until such an event; at the same time they expressed a willingness to hear testimony upon the subject of the descent of the property, at a period before there was any written law.

In the declaration of principles made by the Board of Commissioners to Quiet Land Titles, they declare in substance, that when the Islands were conquered by Kamehameha I., he followed the example of his predecessors, and divided the lands among his warrior chiefs, retaining a portion in his own hands, to be cultivated and managed by his own immediate servants or attendants. Each principal chief divided his lands anew, and gave them to an inferior order of chiefs, by whom they were subdivided again and again. All those persons were considered to have rights in the lands, or in the productions of them. These rights were not clearly defined, but were, never-

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theless, universally acknowledged. It is expressly declared that the superior always had the power, at pleasure, to dispossess his inferior, but it was not considered just and right to do it without cause, and dispossession did not often take place, except on the decease of one of the landlords, when changes were oftentimes numerous, and the rights of heirs and tenants comparatively disregarded for the purpose of favoring a new class of persons.

Kanaina testifies that he is about fifty-eight years of age, and that he was acquainted with Kalaimoku, and that he was one of the chief councillors of Kamehameha I. on important matters relating to the Kingdom, and subsequently of Kaahumanu, and that he was next in authority to Kaahumanu. This was during the minority of Kamehameha III. He says, further, in those days the property went to the children. I understand, on the death of a chief, his children became his heirs; if he had no children, it went to the heirs of his brothers and sisters. "It was so in 1827," the year the original agreement was executed. "The King would not refuse when the chiefs met and said, this is the child, or these are the children of the deceased, the King consented, as a matter of course." He says further, "that property was divided as the testator wished it; that the King would distribute it according to the wish of the testators." Dr. Judd, who has been a resident of these Islands since 1828, testifies that there was no positive rule regulating the descent of property, but generally the party claiming to be heir got it.

Judge Andrews testifies: "There was something in practice called common law, in relation to the disposal of property, but that it was not observed." He says, "The children would divide the property, unless some one wanted it, and went to the konohiki and asked for it." He says, "If the heir wanted it, and the chief did not object, he got it." He says, "I do not recollect an instance where the whole of a high chief's property went to his heir, but the heir would get a good portion of it." Some other witnesses testified on the same subject, and I regard them all as confirming the position which the Court have hitherto taken, that the children were regarded as the rightful heirs, liable to be defeated by will, and by persons of superior authority and power; but in the absence of these, the children

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entered into possession, and enjoyed all the rights of the father. Heirs were recognized by the agreement itself ; by the earliest written laws ; and by the principles adopted by the Land Commission. After a thorough examination of many persons perfectly acquainted with the ancient usages of the country, in relation to those who were vested with rights in the lands, the Board refer in terms to the rights of heirs, as well as of tenants.

The analogy of this system of tenure is very striking to that of the feudal system which has prevailed in Europe, the theory of which was that all property in land was originally in the King or chief who governed the country ; that it was granted to his followers for services rendered and to be rendered, but the superior theoretically retained the title in the land itself. There was the lord and vassal, and were similar in relation to each other to that which existed here. The chiefs here gave certain rights and privileges in lands which were granted to them by the King, to chiefs of lower grades, and so in England the tenure was not limited to the paramount lord and vassal, but it extended to those to whom such vassal may have divided his own lands, and they became his vassals ; so that he became a mesne lord between his vassals and the lord paramount. Heirship was a provision in that code. The right of primogeniture was derived from the martial policy of the system. It had, like the system in every country, provisions of inheritance peculiar to itself ; such for example as the total exclusion of females, which is in contrast to the Hawaiian. Chancellor Kent says that " the transmission of property by hereditary descent, from the parent to his children, is the dictate of the natural affections ; and Dr. Taylor holds it to be the general direction of Providence."

Immediately on the death of Kalaimoku, his son, Leleiohoku, by his guardian, designated by his father, claimed the heirship of the property, was recognized as such by the respondent during his life, which was a period of more than twenty years. The heirship was asserted and recognized, and against those rights no claim or interference was made. So far as a single instance aids in the proof of a general usage, this is very strong, from the fact that the respondent was, from time to time, paying the proportion of Kalaimoku's interest for the

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use and occupation of the King's wharf, according to the agreement to his son, who was regarded as the heir. By the evidence given, by the history of the times, and by the resolutions adopted by the Board of Commissioners to quiet land titles, it is very evident that the rights of heirs were disregarded to a greater or less extent, for the purpose of rendering aid to favorites; but when their inheritance was regarded, and they enjoyed its fruits for a time, which is sufficient to give a title to property by an adverse possession, it would seem to be a late day for a Court, governed by laws regulating descent of property to children, to so far disregard a law based upon principles of natural justice, and defeat a right which, in the darkest days of the feudal system, was held sacred by the King, and earnestly contended for by many of the chiefs of that day.

The Court have already ruled that a party cannot contest the title under which he holds an estate. The same principle applies to the heir when the lessor dies during the term, unless deprived of possession derived from his lessor by a paramount title. In this case it is admitted that the respondent has enjoyed uninterrupted possession of the property, excepting that portion of the original lot taken for the enlargement of the Fort, in lieu of which lot 2 was appropriated and confirmed by the Land Commission. If the claim was for rents and profits of that portion of the King's wharf of which he had been ousted by superior force, the Court would not regard it as valid; but by the force of the agreement clearly and distinctly made before the Board of Land Commission, by virtue of which, as well as by the original agreement, a valuable award was made, I am of opinion that, for lots No. 1 and 2 as surveyed, and upon which the award was made, the respondent should account to the heir for No. 2 with as much reason as for No. 1. Indeed, so far as the rights of the heir are concerned, it was a clear and distinct recognition of his rights, under the old agreement, and the additional article to said agreement was made with the representative of the heir himself and his mother, who held a life estate in lot No. 2.

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It is further claimed that Kalaimoku made a will, and that the King approved it, and that by so doing his property became vested in another than the child of his body.

Kanaina states : " Upon the death of Kalaimoku the chiefs met ; my wife, who was a chiefess, being one, I was present, but not one taking a part. They consulted about the property of Kalaimoku. It was proposed to make over the property of Kalaimoku to the King, but Naihi and Hoapili opposed it, and said, ' we have children of our own,' that is *makou* have children, and then it was decided, and Kaahumanu and Kauikeouli agreed to it, that this property should be made over to Kekauonohi. It was made over to Kekauonohi. This consultation was at an old stone house, in front of the Royal Cemetery, that belonged to Kalaimoku. After the consultation, the chiefs came out and announced what they had decided, and everybody heard it. There were chiefs from Hawaii, Maui and Oahu. Kalaimoku's last sickness occurred during a congress of the chiefs ; that he was lying feeble and expecting to die ; that then a new thought occurred to him. Kaahumanu and Kauikeouli were sitting by him and he thought to *kauoha* them his property, to *hoihoi* it, return it to the King, and that the King should restore it to the child Kekauonohi. I was present at this time and heard what I have stated. Kalaimoku was at the council of the chiefs ; he was lying down sick at the time. Naihi objected, and said ' we have children.' All this matter that I have stated as having occurred after Kalaimoku was dead occurred during his lifetime, but he was sick. The will was discussed before his face in the council, and Naihi said, ' We of our family have children.' (He mau keiki no ka makou.) Kaahumanu and Kauikeouli assented that they should not have the property. Naihi approved it, and the King and Kaahumanu yielded, and it was resolved that it should go to Kekauonohi, according to the first intention."

He further states, in answer to the question if *all* the property went to Kekauonohi : " I will answer, there was some one else, Leleiohoku. Kalaimoku had these two children, Kekauonohi and Leleiohoku ; the property belonged to Kekauonohi : Leleiohoku was a man under Kekauonohi, just as Kalaimoku was under Kaahumanu. At this council of the chiefs about the

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property of Kalaimoku, nothing was said about Leleiohoku having a part of the property. At the death of Kalaimoku, Kekauonohi entered into the possession of the entire estate. At the death of Kalaimoku, Leleiohoku was the only surviving child of his body.

“By the bequest of Kalaimoku, all the property was to go to Kekauonohi, and Leleiohoku was to have none. But he got property—perhaps the half of it, from his sister—such is the ancient custom here, that the sister should provide for the brother and the brother for the sister. This property he got from Kekauonohi, and they lived (*like*) alike on this property, enjoying it in common. The chiefs and the King saw this, and approved of it. They did not do it themselves; but it being done according to the ancient custom, the King and the chiefs approved of it.”

At the time of the division, Kekauonohi got the majority of the lands of Kalaimoku. He says further, that Leleiohoku occupied Pakaka, which Robinson has; which is a house lot, and that alone, on Oahu. Kekauonohi occupied the other lands. He says further, that Kekauonohi never, in her lifetime, held or claimed anything in or from Pakaka, and that after Kalaimoku's death, the lands being occupied by Mr. Robinson, Leleiohoku received the profits.

He says: “As I heard and saw, Leleiohoku held this land as the heir of Kalaimoku, and Robinson said Leleiohoku was the heir and son of Kalaimoku. I heard it generally that Kalaimoku had arranged it with Robinson that Leleiohoku was his heir. I heard this from Hawaii when the money was sent for. Haalelea was the man that collected the rents of this land for Leleiohoku.”

Kekuanaoa testifies that at the time of the meeting of the chiefs it was not a council. There was nothing said at that time about Kekauonohi's receiving the property of Kalaimoku after Naihi had said “we have children of our own.” He further says Kaahumanu gave to Kalaimoku Pakaka. She gave it to him out and out, and without an idea of its being returned. This was not a land, but a house lot; and house lots never paid any tribute to the King, but lands did. Some house lots were given forever, and some were not. That is to say,

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this place, Pakaka, was given to his heirs forever. He testifies he heard Kalaimoku say to Boki : " Don't you go and take the money of my child, Leleiohoku, in Pakaka, the land which Robinson has. I heard the King say that it was right that Leleiohoku should get the money from Robinson."

He says : " He was talking to Leleiohoku, Kekauonohi and others, at the time, and heard it. It appeared as if Kekauonohi and Leleiohoku had disputed about it, and as if Kekauonohi had sent herself for the money ; so it appeared, but I had not heard it. The King approved Leleiohoku, and said he was right—that was all."

Haalelea testifies that he lived at Governor Adams' with Leleiohoku ; that he gave him the agreement of Mr. Robinson and Kalaimoku to keep, as he was the " care-taker " of Leleiohoku. He says that he has, on Leleiohoku's order, collected money on said agreement of Robinson, and on one occasion when he had collected \$3,000 he gave Kekauonohi \$1,000 of it.

He states further : " I have heard Kekauonohi state there was a division of lands between Kekauonohi and her brother. I heard it from them both. It was said in my presence. I heard her say that the King had approved this thing—this business. It was at the house of Kekauonohi, at the time of the mahele of lands."

He further states : " In all my acquaintance with Kekauonohi, and during my marriage with her, I never heard her state that Pakaka was hers. I am her heir under her will. After the death of Kekauonohi, I being her heir, I never thought to claim for myself an interest in Pakaka. The will devised to me every thing, great and small, and did not mention Pakaka."

" Kalaimoku said this child of ours is a child-without property. His sister has the property, and this is the kanaka—the man—meaning Leleiohoku, living under her. He pointed to Kuakini, and said Kuakini is the one who will enrich this child. Kekauonohi was not there. When Kalaimoku died, all his lands and the lands of his ancestors came into charge of Leleiohoku, and we lived there. We had the food, and gave it as we wished. Leleiohoku had the disposition of the products of all the lands, and would give to his sister or not, as he pleased ; and many years passed when he did not give her any.

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“ We understand the *mahele* to be the division of lands, and not house lots, and at that time I recollect Leleiohoku pointing out the land of Pakaka as his house lot. The reason I pointed it out to Leleiohoku was that I noticed that in the division between Leleiohoku and Kekauonohi, Pakaka was not put down in either division of shares. I therefore said : “ You have not included Pakaka, neither that lot at Hawaii, reaching from Kailua to Kahaluhe. Two things have been omitted.” Leleiohoku replied : ‘ They have been put in the house lots ; the clerk has written them down.’ ”

Kekuanaoa says that he had charge of the land of Pakaka, lot No. 2, as the widow’s dower, in her husband’s estate ; and Keelikolani said “ take our part of Pakaka.”

I suppose this part of his testimony has reference to the agreement made before the Land Commission.

It appears that Kuakini and others who had charge of Leleiohoku in his youth, held this agreement with Robinson, and collected money by virtue of it ; that he was regarded by Robinson as the legitimate heir of the property, and that Kekauonohi never claimed in her lifetime anything in Pakaka, and no claim has ever been made by her heirs to said estate. Even at this distance of time, in giving testimony of a will, there is great uncertainty as to the accuracy of the statement. But even admitting that Kalaimoku gave his estate to Kekauonohi, with Leleiohoku as his *kanaka* (meaning thereby one who should participate in it—who had rights in it), it is very evident that it was not the intention that the entire estate should be hers. Pakaka is clearly an exception. Had it been included in the will, would she not have taken possession of it, it being always valuable and productive ? It is somewhat singular that neither Kekauonohi, during her life, nor her heirs, since her death, have made claim, that at this late day, when it is difficult to be satisfied of the exact intentions of the testator by any other means than the conduct of the devisees and heirs themselves, that this respondent should seek to defeat the rights of those whom he has recognized for about thirty-four years, as the rightful heirs of the party with whom he made the original agreement ? As the testimony stands, a Court of Probate could not approve this will, for no Court would sustain a claim against a legitimate

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heir, when he had been in possession of the property from his father's death—especially for this long period—without some explicit intention of the testator to disinherit his child in specific property, which the heirs have enjoyed from the day of his death.

The heir was an infant ; the agreement was placed in the hands of his guardian ; the alleged devisee of Kalaimoku assuming no claim at the time, nor during his life, nor at his death, when the property was claimed by the heir of the son of Kalaimoku. Had the will included this property, it would have been understood at the time, for wills made by word of mouth usually have a construction at the time ; and it is somewhat difficult to enlarge their terms afterwards. What was done by the parties interested, on the death of the testator, and mutually acquiesced in for a long period of time, is the best evidence that they are carrying out the intentions of the testator. And it would be very hazardous, at this late day, to set up new titles, and especially to give the benefit of them to strangers against a rightful heir.

It is in evidence that Kalaimoku died in October of the same year in which the agreement was made, and Mr. Robinson was living on the premises. He admits that he recognized Leleiohoku as the heir ; and it is in evidence that he paid his money under the agreement. Had there been any pretence that this was not a legitimate title—that there was a devise of the property to another—it would have probably been made known. Whatever the terms of the will may have been, and whatever ancient usages may have governed their construction, it is evident that Pakaka could not have come within the purview of those terms, so far as we are enabled to judge by the conduct of the parties interested, or by the evidence which has been adduced in the case.

I have examined this question more than I have regarded it necessary, as the counsel elaborated it with so much labor and ability, for my own view is that the respondent cannot question the title under which he holds by virtue of the contract, nor the title of the heir to the party to that contract, until he has been deprived of possession derived from him by a paramount title.

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The respondent originally obtained possession, and has been permitted to hold it by virtue of the original agreement with Kalaimoku, sanctioned by his heirs as well as by the award of the Board of Land Commission, obtained by virtue of said agreement, and the policy of the law will not allow him, under these circumstances, to be guilty of a breach of good faith in denying the title. It is well settled in England and in the United States, that a tenant can neither deny his landlord's title in ejectment, nor set up an outstanding or paramount title in himself or a third person. This principle applies not only to the original parties to the lease, but applies to all who claim under the tenant ; or take by descent or purchase from the landlord. (2 Smith's leading cases, 57, 658, and cases therein cited.) If any one has a title to this property by will, or by any other claim, let him show it, for it is not legitimate for one party to defeat the payment on an agreement of this character by setting up an adverse title. The heir holds, unless the property is devised by will, and until the will is proved. In this case the will has not been proved according to the ancient usages, for the alleged devisee declared in her lifetime that she never did claim Pakaka.

In any view which can be had of it, no such adverse claim has been made out, as to interfere with the rights of the heirs. The heir holds till the paramount title is made out. There is no pretence that the respondent can suffer by making the payment under the agreement, from any claim which could be presented by the heirs of Kekauonohi ; for it is in evidence by her sole heir, that she never made any claim during her life, and that he has not since her death, and that they knew that Leleiohoku was receiving the profits arising under the contract, and approved of the same ; and that the money was sometimes collected by Haalelea ; and that since his wife's death he has made no claim for the rents and profits. Whatever rights they may have, they cannot be asserted to the injury of the respondent, so far as an account and payment on this bill is concerned.

It is admitted that Leleiohoku was lawfully married to the complainant, and that he died intestate in 1848, leaving a son named John Pitt Kinau ; and I regard it as proved that he was his only child, and therefore by law was his sole heir.

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But it is contended that by the law of 1839, the King would take one-third of the lands of the estate on Oahu, and if notice was not given in two months to the King, then he would take one-half ; and as no notice has been proved, the Court cannot say what lands John Pitt Kinau did inherit. I do not regard it necessary to give an opinion of the rights of the King, by virtue of the law referred to, for it is sufficient for the decision of the present case, for the complainant to prove that John Pitt Kinau was the only heir of Leleiohoku, and that he inherited this property ; and if there was any omission or neglect to give to the King his portion of the lands, it cannot defeat the present bill, nor enure to the benefit of the respondent. Before he can avail himself of any advantages of an omission in the assertion of the rights of His Majesty, or any one else, he must be ousted by the paramount title. When this is done it will be a legal defense to any suit to account ; but this is not the occasion to try that question.

The law, in its terms, refers to certain lands which descend to heirs, and it is very doubtful whether the reference is to lots like Pakaka ; but if it was, the inheritance is complete, and is only liable to be defeated in part of the lands so inherited. It would be a new principle of legal adjudication, for the Court to pass judgment on the rights of parties, strangers to the suit, and upon which no decision had been made upon the subject matter ; and hence the principle of law so fully recognized that a party cannot controvert the title under which he holds an estate ; and the same principle applies to the heir, unless deprived of possession, derived from his lessor, by a paramount title. The principle applies with equal force to the claim set up for Kalama, the Queen Dowager, which it is alleged she has by virtue of the grant and award of a land called Waikahalulu—Pakaka being included within its bounds.. It is not pretended that the respondent has suffered any interference of his possessory rights by virtue of this claim.

The counsel have labored with great assiduity, and have exercised more than usual ingenuity in their efforts to sustain the claims of others to Pakaka, than the parties to the original agreement and their heirs, which includes the respondent as *one* of the original parties, and the complainant as the heir of

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the *other*; and it is especially remarkable, as the parties themselves have neglected to make any claim, and especially in the case of Kekauonohi, who fully admitted the rights of the son and heir of Kalaimoku during her life; and now comes Haalelea, her husband, and says, being her heir: "I never thought to claim for myself an interest in Pakaka." More than thirty-four years have passed since Kalaimoku's death, and Kekauonohi and the heir of her estate never entertained the idea of asserting an interest in Pakaka.

The counsel for the respondent contends further that if the complainant is by operation of law the heir of Kalaimoku's estate, that he is not obliged by the pleadings and proofs as they stand to account for the use and occupation of only that portion included in the agreement, being lot No. 1.

It is alleged in the bill that the true intent and meaning of the said agreement is, that the said Kalaimoku shall receive one-half of all the proceeds of the said premises, whether the said proceeds may arise from rents, wharfage, or the use of the said premises as a ship-yard, the said Robinson being, at the date of the said agreement, and at all times since, a shipwright, after deducting one-half of the expense of altering, repairing or improving the wharf; and the respondent by his answer admits that he did present to the Board of Commissioners to quiet land titles a claim for his rights and interest in and to the entire premises described in the said written instrument, and that the said Board made an award upon the said claim, and avers that thereto attached, and marked A, is a full and exact copy of all the proceedings before the said Board upon the said claim, together with the award thereupon, and that he has never become a party to any agreement with Kalaimoku, or his heirs and assigns, in relation to the premises described in the within instrument, executed by Kalaimoku and the defendant, other than the one set forth in the complainant's bill, and dated 11th day of January, 1827.

Mr. Ii testified that Mr. Robinson, the present respondent, appeared before the Land Commission, and presented the agreement between himself and Kalaimoku. I know that Gov. Kekuanaoa acted in the matter after the death of Leleiohoku, and represented the interest of Keelikolani, the present complain-

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ant, and I represented the child's, Kinau. He said that he conversed with Robinson in relation to the matter, and Robinson said, "how about this, that I should have the upper piece, just as I have the lower piece," and I said, "that is with Kekuanaoa and you," and Robinson replied "that he had so arranged it." Subsequently Robinson entered into possession of that part above the wall, and built a store-house, and has occupied it up to the present time.

The claim of Mr. Robinson, as it appears, was for a lot commonly called the "Point," based upon the agreement with Kalaimoku, and the Board recognized its genuineness, but the claimant alleged an infraction of said agreement and claimed an equivalent, and after the matter was satisfactorily arranged by both parties, the representative of the heirs of the grantor, M. Kekuanaoa, with the consent of the Hawaiian Government, consented that another piece of ground should be added to the original lot, and not formerly included in it, in lieu of the portion taken away, and accordingly the claimant was confirmed in the same rights and privileges in the lot commonly called the "Point," and now including the additional piece under Part No. 2, as described by special survey as lots Nos. 1 and 2, as were granted in the original agreement, and subject to the same rules and conditions as are therein contained, the entire instrument as quoted being now confirmed by the Board in full application to the present claim. It is very evident that the claimant desired lot 2, as an equivalent for what had been taken, and that Kekuanaoa, as agent of the heirs, acquiesced in it. It is equally clear that the guardian acquiesced in it, for it is for the benefit of the ward equally with Robinson.

The mother of the ward surrendered her life estate in said lot for the purpose of having the agreement of Kalaimoku and Robinson carried out. Robinson acquiesced in it by entering upon the possession on the terms and conditions of the original agreement. The complainant acquiesces in it by calling upon the party to the original agreement to account. It was upon the original agreement that the award to Robinson was based in lot No. 1, and upon the rights of the heirs of Kalaimoku also in lot No. 2 that the award was based to claimant. It was an effort to carry out the original agreement in good faith. It

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is contended that the Land Commission could not grant away the land of the heirs of Kalaimoku upon any terms. This is true. Their duty was to decide upon the claims of parties to lands, and confirm them in their rights. Robinson put in his claim to the Point based on the agreement referred to, and complained that a portion had been taken. And the heirs virtually said, in order that your rights may be fully confirmed, another piece shall be added in lieu thereof.

It is further contended that the Board could not impose a covenant upon the defendant to accept the grant upon terms to which he did not agree. As I have said before, I do not regard it a grant, but an award of the rights of the claimant. Neither will the doctrine be controverted that the Board could not impose a covenant to accept the award; but when it appears that he sought an equivalent for the portion taken, and received as such lot No. 2, and immediately went into possession of it, and has been from that time receiving the benefit of its occupation—holding it under the terms and conditions of the original agreement—it seems to be but an equitable fulfillment of the agreement that he should account; for it is very clear that the award was made on terms mutually agreed upon by the parties as well as upon their rights to the lots in question.

The award of the Land Commission to the respondent is peculiar in this, that it confirms him, his heirs, executors, administrators and assigns in the same rights and privileges, and subject to the same rules and conditions as are contained in the agreement of Kalaimoku and said Robinson, the claimant. The award, in the usual form, merely confirms the claimant's title for the land. In this case it is confirmed subject to certain rights and privileges, and to certain rules and conditions contained in an agreement made by the claimant with the original holder of the land.

The Court regard a Land Commission award as final. (1 Haw. Rep., *Kekiekie vs. Dennis*, 42; *Kukiiahu vs. Gill*, 54.) If, then, it gives a title, how far will it inure by its terms to the benefit of the complainant, it having been taken in the name of the present respondent and the claimant before the Board? I regard the award as made for the benefit of the parties inter-

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ested in lot No. 1 by the original agreement, and in lot No. 2, by the agreement made before the Land Commission, and upon which the award was based. The award confirms the rights of the parties in these lots, and the respondent holds them subject to the terms and conditions of the original agreement, and upon which agreement he is legally and equitably bound to account to the complainant.

An appeal having been taken to the full Court from the foregoing decision of the Chancellor, Justice ROBERTSON delivered the judgment of the Court as follows :

It appears that on the 11th day of January, 1827, the late high Chief Kalaimoku, and the respondent, Mr. James Robinson, entered into a written agreement, under seal, which reads as follows, viz :

“ Know all men by these presents, that I, Karaimoku, commonly called William Pitt, Esquire, do hereby assign unto James Robinson, his heirs, executors, administrators and assigns, one half of the wharf commonly called the King’s Wharf, situated near the southwest angle of the Fort, in Honolulu, extending in front one hundred yards or thereabout, and running back one hundred yards or thereabout, on the following conditions :

“ First—The said James Robinson doth hereby bind himself, his heirs, executors, administrators and assigns, to pay one half of all the expenses incurred in altering, repairing or improving the said wharf, and to pay to Karaimoku, his heirs, executors, administrators and assigns, one half of all the monies received for the use of the said wharf and premises ; and I, Karaimoku, do hereby agree to pay one half of all the expenses incurred in altering, repairing and improving the said wharf, and we do hereby bind ourselves, our heirs, executors, administrators and assigns, to fulfill the above agreement.

“ Given under our respective hands and seals, at Honolulu, this 11th day of January, in the year of our Lord, 1827.

(Signed)

“ KARAIMOKU, [L. S.]

“

“ JAMES ROBINSON, [L. S.]

“ Witness :

“ FRANCISCO DE PAULO MARIN.”

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About the time the foregoing deed was executed, and in pursuance thereof, the respondent entered into possession of the entire premises therein described, and he has ever since continued to occupy and use said premises, with the exception of a part thereof taken possession of by the Government a few years after the date of the deed, and in lieu of which, it is alleged by the complainant, an addition was made to the original premises in the year 1851, of an adjoining piece of land, not embraced in the above deed, which the respondent has occupied and used since that date.

It is admitted that the respondent has received rents and profits, to a large amount, from the use and occupancy of the premises described in the deed, and also from that afterwards added; and it appears he has, at divers times, made payments of sums of money, to those who claimed to be the legal representatives of Kalaimoku, on account of their shares under the agreement, but that no final accounting or settlement has at any time been made by the respondent. The complainant, therefore, setting up in her bill that she is now the lawful representative of Kalaimoku, prays that the respondent may be required to account to her, as the party entitled to a share of the rents and profits.

It appears that Kalaimoku died, on the island of Hawaii, about the month of October, 1827, and it is alleged that he left as his only son and heir, the late Gov. William Pitt Leleiohoku, who died in the year 1848, leaving, it is alleged, as his only son and heir, the late John Pitt Kinau, who died in the year 1859, being still a minor and without issue, and whose estate, it is admitted, was inherited by his mother, the complainant, as his heir at law.

At a former stage of the cause, it was decided by the Court that the respondent could not be permitted to dispute the title of Kalaimoku to the land in question; but, as I took occasion to say, when ruling upon the first demurrer, the respondent may well dispute, in my opinion, the right of any other party claiming an account of rents and profits, as the inheritor of Kalaimoku's interest in the land, and of his rights under the agreement of 1827. By that agreement Kalaimoku conveyed to Mr. Robinson an undivided half of the land, and created a

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tenancy in common in the premises, the estate of the respondent, however, being, perhaps, defeasible. It is quite possible that to-day the estate of Kalaimoku, including the right of reverter in that granted to Mr. Robinson, if his title is defeasible, might be the property of one person, while the present enjoyment of the share of rents and profits, under the agreement, might be the property of another. It seems to us, therefore, that two questions arise under this branch of the case, as presented by the pleadings, viz: Is the complainant the inheritor of the estate of Kalaimoku in the premises in question? and is she the party presently entitled to a share of the rents and profits? The last question seems to us even more important than the first, for as there is no privity of estate between the parties as tenants in common, (Blackstone's Com., book 2, chap. 12; Kent's Com., vol. 4, p. 385), it is by reason of the privity of contract that the respondent is bound to account to whoever is the lawful representative of Kalaimoku. If the complainant has made out a sufficient *prima facie* case in favor of her being now the tenant in common of respondent, and as such entitled to share in the profits, the burden is thrown upon the respondent to rebut complainant's claim, and if he fails in doing so, she must take a decree against him for an account.

At the hearing, respondent admitted it to be clearly proven that William Pitt Leleiohoku was the son, and, so far as appears, the only child of Kalaimoku, but contended that the fact of his being such did not necessarily make him the heir of his father's property, inasmuch as at the time of Kalaimoku's death there was no fixed or uniform law of inheritance in this Kingdom, by force of which a son inherited, of course, as heir of his father. A considerable amount of valuable testimony has been presented touching this point, and upon a careful review thereof, we are of opinion that the respondent is right in his position, and that in the year 1827 there was no fixed or uniform law of inheritance in the Kingdom, such as has existed here for the last twelve or fifteen years. At the same time, however, it seems abundantly clear that among the higher class of chiefs at least, the possession and use of lands usually descended from one set or generation of holders to another. That is to say, upon the

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death of a landholder the possession of his lands was not ordinarily resumed or appropriated by the King. The fact of a general transmission of the possession of lands seems well established, although such transmission was not governed by well defined rules or uniform custom.

This brings us to the next point, for it is contended by the complainant that, as a matter of fact, Leleioboku did inherit his father's interest in the premises occupied by the respondent : while on the other hand, it is contended that Kalaimoku, shortly before his death, made a verbal will, bequeathing his entire property to his niece, the late female chief, Miriam Kekauonohi. Kekauonohi, although only what we call a cousin of Leleioboku, was regarded, according to ancient Hawaiian ideas, as his sister, and it appears that Kalaimoku, in making a verbal disposition of his property, expressed his will that his lands should pass to Kekauonohi, who was older than Leleioboku, and that Leleioboku should be the *kanaka* living under her. Accordingly, it seems that subsequent to the death of Kalaimoku, Kekauonohi was regarded as having inherited his lands, but Leleioboku participated with her in the enjoyment of their usufruct, and when the Great Division of 1848 arrived, Kekauonohi and Leleioboku made a private division of the lands inherited from Kalaimoku, previous to presenting themselves before the King as *konohikis*.

It seems clear, too, that the wharf lot which forms the subject of this controversy, never was looked upon as standing in the same light with the other property of Kalaimoku. It was treated as a specialty from the beginning. Even before his death, Kalaimoku cautioned his turbulent rival Boki, in the presence of others, to abstain from interfering with the money to be derived from his agreement with Mr. Robinson, which he spoke of as belonging to his son Leleioboku. It does not appear that the agreement ever came into the possession of Kekauonohi, but was carried to Hawaii by Kalaimoku, who gave it to Governor Kuakini, in whose charge also he left his son. Kuakini, after the death of Kalaimoku, confided the keeping of the deed to Levi Haalelea, who occupied the relation of a *kahu* to Leleioboku, telling him it was the property of the child, and subsequently, when Leleioboku sent Haalelea to ask for money

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from Kuakini, he replied that he had already given him money, or its equivalent, by giving him the deed. There can be no doubt that Leleiohoku was recognized by the late King as the inheritor of Kalaimoku's interest in the wharf premises, and entitled to the moneys accruing under the agreement. Upon one occasion Kekauonohi received, with Leleiohoku's consent, a portion of a large sum of money paid by respondent upon an order from Leleiohoku, but there is no evidence to show that Kekauonohi ever considered herself as heir to the property in question, or its profits. She presented no claim to the wharf lot before the Land Commission, nor did she ever set up any title to it as against the heir of Leleiohoku, after his death, and Mr. Haalelea, her sole legatee, states that this property is not included in her estate as devised to him. Further, it is alleged and admitted that Leleiohoku was always recognized by the respondent as heir of his father's rights under the agreement. It is true, as contended, that respondent might have recognized Leleiohoku and made payments to him as heir, through mistake, and the fact that he had done so should not prejudice him now, or be held to bind him to continue paying a share of the profits to a party not legally entitled to demand it. But the fact that Leleiohoku was recognized by the respondent, in common with other interested parties, for a great many years, taken in connection with all the circumstances attending this branch of the case, affords evidence irresistibly strong in favor of Leleiohoku being the heir. There can be no doubt, it seems to us, that whatever other property Kekauonohi may have inherited from Kalaimoku, she never inherited his rights in Pakaka.

It is contended further, on the part of the respondent, that it is not clear that John Pitt Kinan inherited his father's rights in this property and contract, inasmuch as it does not appear that at the death of Leleiohoku in the year 1848, a compliance was made with the law of 7th June, 1839, respecting the descent of lands to heirs. (Old Laws, page 47, Sec. 14.) The law referred to enacted, in relation to lands which had been given to land agents (konohikis) by Kamehameha 1st and Kamehameha 2d. that upon the death of any konohiki, his heir should render an account of the lands held by the deceased, and restore one-third of them to the King; and that if the heir suffered two months

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to elapse without presenting himself, or sending a written notice, he would be required to give up one-half of his ancestor's lands. No compliance with the requirements of this law having been proven, it is argued that the Court cannot be aware what portion of Leleiohoku's lands were inherited by his son, and he may not have inherited Pakaka.

This objection is met in several ways. In the first place, as a matter of fact, it appears by the documents filed in Probate Court, during the settlement of Leleiohoku's estate, that Pakaka was included in the enumeration of his property, as presented before the Court and acted upon by the guardian of the heir and the widow, in the adjustment of the widow's dower, and there is no evidence whatever that Pakaka, or any other part of Leleiohoku's property, was claimed or resumed by the King. Indeed, in view of one of the provisions of the law of 1839, admitting that law to have been in force at the time of Leleiohoku's death, his heir was not obliged to restore any part of the lands held by his father. That provision, which was not adverted to during the argument, is to the effect that if the heir of the konohiki was his own child, he should not be required to restore one third of his ancestor's lands to the King, unless such heir had previously been enriched by being heir to some other Chief. This seems to us of itself a sufficient answer to the objection; for, if necessary, we think the Court, under the circumstances of this case, would feel bound to presume, until the contrary was shown, that if any such formality was requisite as that contended for, it had been complied with.

But it is cogently urged on the part of complainant, that the law of 7th June, 1839, was not in force at the time of Leleiohoku's death in 1848. This argument seems to us entitled to great weight; for while it is true that the chapter of the old laws which contains the enactment referred to, had not been expressly repealed by name in 1848, it is evident that some of the provisions of the second and third Acts of Kamehameha III. are entirely inconsistent with the tenor of that enactment. As early as 1846 provision was made for the establishment of judicial tribunals of general jurisdiction, whose powers included among other things, the functions of a Court of Probate: hence it is argued that, upon the passage of the second Act of

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Kamehameha III. it was plainly the intention of the King and Legislature to vest in the Courts the exercise of all the functions of a judicial character appertaining to this subject, which had previously been exercised by the King, the Premier or the Governors. In the Act to organize the Judiciary Department (third Act of Kamehameha III.) passed in 1847, in which provision is made for the settling up of the estates of persons dying possessed of property, whether testate or intestate, nothing whatever is said of reporting the death of a landholder or the names of the lands held by him, to the King or Premier, nor has any evidence been adduced to show that such formality has ever been deemed necessary since the passage of the organic Acts.

Further, the institution, in 1846, of a tribunal invested with the powers conferred upon the Board of Commissioners to quiet land titles, with the avowed intention of separating the previously undivided rights of the King, Chiefs and Makaainanas, and of putting an end to the ancient system of land tenures, was wholly inconsistent with the retention, on the part of the King, of the right to resume any portion of the lands held by a konohiki upon the occurrence of his death. Such right could no longer exist. The titles awarded by the Board were free of all burdens except ~~that~~ affecting certain classes of them, which were subject to the payment of a commutation to the Government, to render them allodial. Had the Board succeeded in completing its work within the period of two years originally allowed for the purpose, Leleiohoku would have had an award for his lands before he died, securing them to him in their entirety, either by name or by metes and bounds. Again, the great division of lands between the King and the konohikis took place in February, 1848, some time before Leleiohoku's death, and the lands then granted to him by the King were so granted without reservation of any kind upon the part of His Majesty. In short, the establishment of the Land Commission, by the King, and the division of 1848, were, in our opinion, so clearly a repeal of the provision relied on in the law of 1839, that express words for that purpose would have seemed superfluous.

The last and perhaps the most obviously conclusive argument

urged against the objection raised by the respondent, under the law of 1839, is this: That said law, like the division of 1848, had no application to that species of landed property which formed the subject matter of the agreement between Kalaimoku and the respondent. We regard this argument as sound beyond question. The following remarks occur in the "Principles adopted by the Board of Commissioners to quiet Land Titles." (See vol. 2 Statute Laws, page 84.) "But between the ownership of lands for cultivation and mere building lots, there are often broad lines of distinction. Mere building lots were never bestowed by the King or Lords for the purpose of being given out to tenants, as was uniformly the case with the lands suitable for cultivation. It follows, therefore, that (with some exceptions, which in all cases must be proved) in relation to building lots, there is no third class of persons having the rights of lords over tenants. The exceptions would be in those cases where individuals having received building lots from the King for their own particular use, those individuals have themselves, for some consideration expressed or implied, transferred such lots to third parties." We may remark in passing, that this case is not within the exception, nor is the relation of Kalaimoku's representatives to the respondent that of a lord over a tenant, but, so far as concerns this Court, of one co-tenant towards another. Kalaimoku did not transfer the entire lot to Mr. Robinson, but granted him an estate in it in common with himself. Governor Kekuanaoa, in his testimony, when speaking of the gift of Pakaka by Kaahumanu to Kalaimoku, says: "This was not a land but a house lot, and house lots never paid any tribute to the King, but lands did. Some house lots were given forever, and some not. That is the way that place (Pakaka) was given—to his heirs forever." Lastly, the language used in the law of 1839 is incompatible with the notion of its applicability to such lots. The Act speaks of *na aina* of the konohikis, narrowly translated in the English version as farms, given to the land agent. The language of either version, as well as the whole tenor of the law itself, excludes the idea of its application to town lots or wharf lots.

After what has been said, there can be no doubt that John Pitt inherited his father's rights in Pakaka, and as it is admitted

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that complainant inherited the rights of her son, the first question we proposed is satisfactorily answered in favor of complainant. Let us proceed to examine the second.

Having enforced the last argument, derived from the peculiar nature of the property involved, as against the position taken by the respondent under the law of 1839, we will now endeavor to show that the same line of argument is equally conclusive as against the next point made by the defense. It appears that in the division of 1848 the land called "Waikahalulu," within the ancient boundaries of which Pakaka is situated, was granted by the King to Queen Kalama, and her title was subsequently further perfected. Under the general rule that the party holding an award or patent for an ahupuaa is the owner of all the land embraced within its boundaries, except such portions of it as have been awarded by the Land Commission to other persons, it is contended by counsel for the respondent, that unless the complainant has shown that Pakaka was awarded by the Land Commission to Leleiohoku or Pitt Kinau, the fee of that lot has become vested in the Queen Dowager as a part of Waikahalulu, and that in consequence she, and not the complainant, is now the owner of the rights formerly possessed by Kalaimoku and Leleiohoku. This argument would be entitled to weight if the rule relied upon could be held to apply in this case; but we must hold the reverse. In our opinion upon the grant of Pakaka to Kalaimoku by Kaahumanu, which was the same as a grant from the King, it ceased forever to form a part of Waikahalulu as held by the konohiki. Pakaka, part of which was known as the King's wharf, thenceforward became, like many other town lots situated within the natural boundaries of Waikahalulu, a portion of a new class of real property which was not covered by the law of 1839, the Great Division, nor the rules affecting the ordinary *kuleanas*. A part of the remarks already quoted from the Principles of the Land Commission, may be cited here again: "It follows, therefore, that (with some exceptions, which in all cases must be proved) in relation to building lots, there is no third class of persons having the rights of lords over tenants." The Queen Dowager, in her capacity of konohiki of Waikahalulu, could not have been recognized as a counter claimant for Pakaka before the Board. If such a lot escheats

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for want of heirs, it escheats to the State, and not to the ancient konohiki. The commutation payable upon town lots awarded by the common freehold titles, is payable to the Government, and not to the lord of the ahupuaa. In our opinion, if to-day the title which Kalaimoku formerly possessed in Pakaka is not legally vested in his heirs, it might be recovered by the Hawaiian Government, but never by the lord of Waikahalulu.

At the hearing, counsel for the respondent did argue before the Court, that the heirs of Kalaimoku had not entered their claim, and obtained an award from the Land Commission for a title to Pakaka, and that therefore they had lost their rights, by virtue of the statute barring all claims not presented within the time allowed for that purpose. In other words, that the Court is bound to take notice, that the rights of Kalaimoku's heirs have become forfeited to the Government by operation of law, and that the Government is now tenant in common with the respondent. But it appears to us, as contended on behalf of complainant, that the Court cannot proceed upon this assumption. The Hawaiian Government is not and could not become a party to this suit, nor does it appear that the Government has ever instituted any proceedings to enforce a claim to Pakaka as against the heirs of Kalaimoku. Had the Government done so successfully, then, in our opinion, the respondent might with propriety and success have plead its recovery, as a complete bar to the complainant's suit. But, as we remarked at a former stage of the cause, the *title* to the land is not put in issue by the pleadings in this suit; and, as we have said above, if the respondent is bound to account to the present complainant, it is not by reason of privity of estate between them, but by reason of privity of contract, under the agreement of 1827.

It appears by the evidence that Leleiohoku did present a claim for a title to Pakaka before the Land Commission, but his claim does not appear to have been directly adjudicated, nor was any award issued thereon, either to him or to John Pitt Kinau; while Mr. Robinson also presented a claim upon which the title was formally adjudicated, and an award issued to him. But it would seem to us out of order for the Court in this suit, because of the reasons in law which we have just stated, to enter upon an examination and decision of the interesting ques-

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tion, as to how far the award obtained by the respondent, whose possession was that also of the other tenant in common (Thomas Coke's 1st Inst., Vol. 1, page 758; Kent's Com. 4, page 387), ought to be regarded as an award also upon the title of his co-tenant, Leleiohoku, and as enuring, in equity, to the benefit of the heirs of Kalaimoku; for the Court will not, although asked to do so, decide in advance questions which are not fairly or necessarily in issue in determining the rights of the only parties now before it. We do not hesitate to say, however, that as Leleiohoku does not appear to us to have been guilty of contumacy, the way seems fairly open for an application, on the part of the complainant as the representative of Kalaimoku, to the Government, for a fee simple patent, based upon the award made in favor of her co-tenant and bailiff, to be issued on payment of the usual commutation, which, if obtained, would set the matter at rest.

In our opinion, the complainant, so far as now appears, is the only party entitled to a share of the usufruct with the respondent, and must therefore take a decree against him for an account.

But it is contended by counsel for the respondent that, if the Court shall decree against him, he is only bound to account for the profits arising from that portion of Pakaka designated as Part 1 in the Land Commission award. It appears that several years after the date of the grant by Kalaimoku to Mr. Robinson, the Government took possession of a part of the lot comprised in the agreement for the purpose of enlarging or improving the fort, and that the part so taken away was never restored to the possession of respondent. When he presented his claim before the Land Commission, as appears by the recital in the award, he demanded an equivalent for what had been taken from him; and as the widow and heir of Leleiohoku were the owners of the adjoining portion of Pakaka, now designated as Part 2, an adjustment was arrived at, after considerable delay, by their consenting, through Governor Kekuanaoa, with the approval of the Government, to add Part 2 to Part 1, so as to include both in the award and survey to be delivered by the Board to Mr. Robinson. An award was issued in accordance with that adjustment, declaring the grant made by Kalaimoku

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to include within its limits all the land described as Part 1 and Part 2, which award was accepted by the respondent, who has ever since held possession of the additional piece of ground, deriving profits from its occupation. Counsel argues first, that the tenancy in common in the land, called Part 2, was not conveyed to the respondent by the heirs of Kalaimoku, but by the Land Commission, for the King, in lieu of the alleged deprivation. He then goes on to argue that the Board had no authority to grant away the land of the heirs of Kalaimoku upon any terms, and that it does not appear they had attempted to do so; and if they had done so, they could not have imposed a covenant upon the respondent to accept the grant upon terms to which he did not agree. The unsoundness of this argument seems to us no less apparent than its inconsistency. It might be answered briefly by saying that the Land Commission, with the powers of a Court of Record, was competent to judge of its own authority, and whatever it did was final, unless reversed or modified by the Supreme Court upon appeal. But there is another answer: It is true that the Land Commission had no power to grant away the land of Kalaimoku or his heirs to the respondent. Had the parties appeared as counter claimants to Part 2, the Board could have declared to which of them it belonged; or had there been a dispute as to the boundary line between Part 1 and Part 2, the Board could have decided that. In this case the question was as to how much land should be included as covered by the agreement of 1827, in view of the alleged deprivation, and the Board, with the consent of the parties interested, settled the question by adding Part 2 to the land previously occupied by the respondent, and thereupon issued an award in accordance with one of its standing rules, which, in cases of a title based upon a written grant, required the award to be made in strict conformity with the terms and conditions of such grant. (Vol. 2 Statute Laws, page 92, subdivision 4.) The respondent claimed that Part 2 should be included in his grant; his claim was acceded to, and he accepted an award for the whole, to be held pursuant to the conditions expressed in the agreement of 1827, under which he had made his claim. No new covenant was thrust upon him. But it is said no written grant has been shown from the representatives of

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Kalaimoku to Mr. Robinson, of the land called Part 2. In our opinion none was requisite. We are not aware of any statute of the Kingdom, in existence at the time, which rendered void a verbal conveyance of an estate or interest in land, as between the parties to it; and besides that, the objection, if valid, could be obviated even now, under the direction of the Court. Again, this is not a suit for the specific performance of an agreement to convey lands, but a suit to enforce the performance of a covenant annexed to a conveyance which has been executed by the delivery of possession.

For these reasons we are clearly of opinion that the decision of the Chancellor should be affirmed, and the respondent decreed to account, as bailiff of the complainant, his co-tenant, for her share of the usufruct of Part 1, from the date of the grant by Kalaimoku, and for that part of Part 2, from the date of the Land Commission Award.

In accordance with the decision of the Chancellor, and in conformity with the practice of this Court, complainant's counsel presented the draft of an order requiring the respondent to account, framed in conformity to the prayer of complainant's bill. Respondent's counsel saw fit to permit the order to be granted by the Chancellor, without their appearing to offer objections, or to show cause against it; but at the hearing before the full Court, they took exception to the order on the ground of its being broader in its terms than the agreement of 1827, as they construe it. We have, therefore, after considering the arguments of counsel, determined to supercede that order, and to issue in lieu thereof, an order couched in the precise language of the said agreement, requiring the respondent to account for "all the moneys received for the use of the said wharf and premises," so as to afford Mr. Robinson an opportunity to account, in the first instance, upon his own conscience, his own understanding of his agreement with Kalaimoku, and his own sense of right. When the respondent shall have so accounted, if his account should not prove satisfactory to the complainant, we will then hear the parties further. The fresh order has been prepared under the direction of the Court, and will be appended to this judgment.

Messrs. Harris and Davis for complainant.

Messrs. Bates and Montgomery for respondent. [July, 1862]

Isaac Montgomery *vs.* Daniel Montgomery.

SUPREME COURT—IN EQUITY.

ISAAC MONTGOMERY *vs.* DANIEL MONTGOMERY.

THE writ of injunction must be specifically prayed for in the bill or it will not be granted.

When the allegations of the bill are based upon the fraudulent conduct of a party, an injunction may be issued as a matter of precaution, although an intention to dispose of the property at issue can not be proved.

The granting or refusal of an injunction rests in the sound discretion of the Court, in view of the nature of the case and of the whole allegations in the bill.

The rule admitted that it is usual to dissolve an injunction, where the whole merits of the bill are satisfactorily denied by the answer, yet there exist exceptions to this general doctrine ; and after the coming in of the answer, the question of dissolution of a special injunction is one, addressed to the sound legal discretion of the Court.

If by the bill and answer questions of law were involved of a doubtful character the injunction should be sustained.

Proceedings at law imposing restraint upon the disposition of property as authorized by the statute, not considered as analogous to the issuing of an injunction in equity.

In the present case, the facts alleged in the answer, being derived from personal knowledge and in direct and explicit denial of the allegations in the bill, the injunction was dissolved.

ALLEN, C. J.

This is a suit in equity, in which the complainant avers that M. Kekauonohi executed and delivered a deed of conveyance to him of a tract of land, called Puuloa on the 7th of September, 1849, and that on the 15th day of the same month he caused to be indorsed on the said instrument the following :

“ For and in consideration of the sum of eight thousand dollars, to me in hand, paid by Charles W. Vincent, of Honolulu, Island of Oahu, Hawaiian Islands, the receipt whereof I hereby confess and acknowledge, bargained, granted, assigned, sold and transferred to the said Charles W. Vincent, all my right, title, interest and estate, of in and to the within described estate ; to have and to hold the same to him, his heirs, executors, administrators and assigns forever.

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"In witness whereof I have hereunto set my hand and seal this 15th day of September, A. D. 1849.

(Signed,) ISAAC MONTGOMERY.

In presence of FRANK MANINI, J. O. CARTER."

The registry of the deed and the assignment bear date the 4th day of November, 1854.

He further avers that the said Vincent never paid him the consideration as alleged, but held the estate in trust for the use and benefit of the complainant, receiving for his said trust and management one-third part of the profits of the estate.

It is further alleged in the bill that the stock and furniture were purchased by the complainant, or by his funds; and further, that the estate was mortgaged by said Vincent to B. F. Angel, for the sum of five thousand dollars, and that the money arising therefrom was received by the complainant and said Vincent, and that the latter gave his note for the amount he had received to the respondent, who, on the 20th of July, sued said note and received judgment thereon; and further, the said mortgage was paid by raising money on the estate.

The complainant further alleges, that the respondent, his brother, was induced to come to this country by him, that he paid his passage hither, and that he arrived here on the 17th of February, 1855, in very destitute circumstances; and that on the 20th of June of the same year, said Vincent, by the request of complainant, executed a deed to the said respondent, of said estate, for and in consideration of \$15,000 (fifteen thousand dollars); and he further avers that the consideration was nominal, that no money was paid to Vincent by respondent, that he was at the time without means, or credit, and that the object of the deed was that the estate might be held by him for the benefit of the complainant, who says that there was no verbal agreement with his brother that he should draw from the receipts of the property one hundred dollars per month; and that at the end of each year, the respondent should receive for his services one-third of the profits of the business, and the complainant two-thirds; and that the one hundred dollars per month was to be accounted for on final settlement; that the respondent continued to pay him money, but no settlement has been made: but of late he refuses to pay him anything, and denies that com-

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plainant has any interest in the estate ; and the complainant further alleges that it was expressly understood and agreed, that when he might desire it, the said estate was to be conveyed to him, or to whomsoever he might direct ; that he has made repeated efforts for a settlement, but without success ; that the respondent has offered only to give his notes secured on the estate for ten thousand dollars, payable in seven years, which he regards as wholly inadmissible, as the estate cost him fifty thousand dollars, besides many years of toil and care, since 1842.

Wherefore the complainant prays that said respondent may be summoned to answer, and to render an account of the dealings and transactions appertaining to the Puuloa Salt Works, from the 19th of June, 1855, till the day of filing the account ; that the amount due complainant may be ascertained, and that respondent may be decreed to pay the same, and also to bring into Court all the books and papers and accounts appertaining to the estate, and that he be ordered to convey the estate to complainant.

The complainant further avers that said respondent is carrying away and selling the salt produced on the estate ; and that he is intending to alienate the property on the estate, to the injury of complainant ; and he further prays that said respondent may be enjoined not to sell or dispose of the said land, or any part thereof ; or to sell any of the stock or other property thereon ; and that respondent may be ordered to deliver up to complainant the estate and other property.

The respondent, in his answer, admits that M. Kekauonohi did execute and deliver a deed of Puuloa to the complainant, and that he transferred the same by a certain instrument made on said deed to Charles W. Vincent ; and that the registry was made on the 4th of November, 1854, as alleged.

The respondent further says that he was a resident in England at the time of the date of said deed, and has no personal knowledge of the facts or circumstances attending the said transaction, or of the consideration paid by the said Vincent for said property, but is credibly informed and verily believes, that the consideration of eight thousand dollars, as specified in said deed, was paid to complainant by said Vincent ; and especially

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is he confirmed in this belief, from the fact that the complainant has never intimated that said consideration money had not been paid him.

Defendant further answering, saith he has no personal knowledge whether the complainant, as in bill alleged, continued until the 21st June, 1855, to enjoy a large or any portion of the proceeds of the said estate, or whether the same, if true, was, or was not, according to an agreement in bill alleged, as between the complainant and the said C. W. Vincent ; or whether the said Vincent in fact held the estate in trust for the use or benefit of the complainant, as in bill alleged ; or whether said writing was made for the purpose of enabling the said Vincent to manage the said estate more effectually for the use or benefit of the complainant ; or whether the said Vincent received for his alleged management one-third or any other, or what part of the proceeds, of the said estate, but saith this defendant is credibly informed, and verily believes, and therefore avers, that all the said above last-mentioned statements and allegations are without any foundation in fact, and were never alleged by the complainant, in any of the intercourse between them, since defendant arrived in this Kingdom.

The respondent further avers that he does not know whether the furniture was furnished by the complainant, or with his funds, but believes that it was the property of said Vincent, for the reason that complainant never made any claim for it ; that the stock of cattle were sold by the express order of the complainant, at auction, for the purpose of raising money to pay costs and expenses of a prosecution which had been pending against him ; and that the respondent purchased the same, and paid the money for the purposes aforesaid.

The respondent admits the mortgage of Vincent to Angel, and believes it to have been made by him as the sole and *bona fide* proprietor of said estate, but denies that Vincent gave him his note for any part of said loan, but that the note on which the respondent obtained judgment against him was for an entirely different consideration, and wholly unconnected from the Puuloa estate.

The respondent further says that the mortgage referred to in the bill, to Angel, was paid by his note and mortgage to said

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Angel. He admits that he came to this country at the intimation of complainant, but denies that he came in destitute circumstances, for he was skilled in the art of ship-building, as well as having general business qualifications, and with sufficient means at his command to establish himself independently of his patronage ; and he further says that he does not know whether said deed from Vincent was executed at the request of complainant, but denies that the sum of fifteen thousand dollars, as stated, as a consideration in said deed, was merely nominal, but states that it was the price at which he purchased the estate of said Vincent, who sold him the same on time, secured by his negotiable notes and mortgage of the estate ; and he denies further that the intent and object of the conveyance was that he should hold the estate for the use and benefit of the complainant, or for the purpose of enabling himself to manage it with more facility, for the use and benefit of complainant.

The respondent admits that he did not pay any money to said Vincent on account of said purchase, for by the terms of the contract no part of the said purchase money was payable in cash, but the whole amount was received as before stated, and said Vincent informed him that he had transferred said notes and mortgage to the complainant for a valuable consideration, soon after the purchase, and before any money had been paid.

And this defendant further answering saith, he denies the allegation in said bill, to the effect that any agreement, either verbally or in writing, was ever made between the complainant and this defendant, by which complainant should draw from the earnings or receipts of the Puuloa property a sum of \$100 per month, or any other sum of money, or by which the complainant was to have any interest in, or share of, the profits of said property or establishment, or that defendant was to keep any account, or make any settlement with complainant, in relation thereto, as in bill alleged ; and also denies the allegations in said bill that this defendant, for a long time, or at all, continued to pay, or ever paid to the complainant, any sum of money, on such pretended agreement, or for any share or interest in Puuloa establishment ; but saith that this defendant did pay, from time to time, very large sums of money to the complainant, as holder of the said promissory notes and mortgage.

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The respondent answers and says that the house placed on the estate by complainant was so placed by his request, and not in the exercise of an undoubted right; and further, that the complainant has never been accustomed to examine the books containing an account of the business of the said estate; nor has he ever made a request so to do since respondent purchased the estate. He further denies that there was any understanding and agreement with him that he was to convey the estate to the complainant on his request, or to any one whom he might direct.

The respondent further answers that the complainant has not made any attempts to obtain a settlement with him, in relation to said estate, or the business connected therewith as alleged, or pretended any right to a settlement in relation thereto.

The complainant replies that he does not know whether the respondent executed notes to said Vincent for \$15,000, secured by mortgage; neither does he know whether they were transferred to him by indorsement or assignment. The repliant further avers that if they were executed, it was for form only, and no such mortgage is recorded; and further, that for a year from October, 1855, the defendant had possession of all the papers belonging to him, and that, if such papers were executed, and in existence, they are in possession of the defendant.

The complainant replying, further avers that the sum of \$145 was never paid by the defendant, and received by the complainant for cattle; nor were the cattle ever sold by plaintiff or bought by the defendant; that many more cattle have been bought since said advertisement for sale, by property, on the estate belonging to complainant, and have been taken for debts due to him; and further, that all the averments in complainant's bill are true.

Upon the coming in of the answer, the counsel for the respondent moved to dissolve the injunction which had been granted to restrain the respondent from conveying the real estate and the personal estate thereon. And contended that the injunction should not have been granted, and ought to be dissolved, on the ground that it is not alleged in the bill that the defendant intends to alienate the real estate, but only the personal property thereon; or that it is in the knowledge of the

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complainant that respondent intends to alienate the property. Neither does the bill allege it, on information and belief; but it alleges only that the plaintiff has reason to believe, not that he does believe, that the defendant is intending to alienate property on the estate.

It is very true that an injunction must be specifically prayed for in the bill. It is the uniform practice not to grant this remedial process, unless it is so. This constitutes an exception from the general doctrine, as to the efficacy to the prayer for general relief; and there is some reason for this exception, for it has been truly said that the defendant might make a different case by his answer against the general words of a bill, from what he would have done against the specific prayer for an injunction.

The injunction in this case was prayed for specifically in the bill, and this prayer was based not upon any averment of knowledge of the intention of the respondent to make sale, but upon the alleged merits of the bill, and the legal apprehension that the respondent might be induced, by the suit, to place the title of the estate in other persons. The allegations, as contended for by the respondent, would strengthen the prayer for an injunction, especially if supported by affidavits, because there would be reason for dissolving this injunction, if it was in proof that the respondent was negotiating to sell and convey the estate, either real or personal; except the personal estate in the ordinary course of business.

If the allegations in the bill are true, the respondent should convey the estate to the plaintiff, for he holds it in trust, at the will of the complainant, and after demand, the respondent should state his account, and make his conveyance, and there would be perfect justice in restraining the sale under such a state of facts. I do not regard the allegations in cases like the present, as necessary as contended for by the respondent's counsel, of knowledge that he intends to sell. If such intention is necessary to be alleged, it is necessary to be proved. Those most adroit and skilled in fraud would be careful not to permit any intention to be discovered. But when the allegations are based on the fraudulent conduct of a party, as a matter of precaution, an injunction may be issued, although the party cannot prove any effort or intention to sell.

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I do not regard the authorities cited by the respondent's counsel as sustaining the position assumed by him. It would be a restraint upon the action of the Court, by which innocent parties might seriously suffer. While courts should be certainly careful in issuing writs of injunction, it should not be placed within the power of an adroit and skillful man to prevent it, by taking a course which would prevent proof of a knowledge of his intention to sell. But, I regard the granting or refusal of an injunction before answer as a matter resting in the sound discretion of the Court, in view of the nature of the case, and of the whole allegations in the bill; and I regard a specific prayer for an injunction in this case as sufficient, without the allegations as contended for in the bill. There are many cases when this intention should be alleged and proved before an injunction should be imposed on one's business, but this is not of that class of cases. I know of no authority which makes it necessary in a case of this character; and if there was, I should hesitate to follow it in all cases, for it might lead to great inconvenience, additional expense of litigation and delay, and, perhaps, irreparable mischief.

It is contended, further, that all the equities of the bill, having been fully and unequivocally denied by the answer of the respondent, that therefore the injunction ought to be dissolved. It is undoubtedly true, that if the whole merits are satisfactorily denied by the answer, the injunction is ordinarily dissolved. But there are, as Mr. Justice Story says, in *Poor vs. Carleton* (3 Sum. Rep., 74), exceptions to the doctrine, and these, for the most part, are uniformly resolvable into the principle of irreparable mischief, such as cases of asserted waste, or of asserted mismanagement, in partnership concerns, or of asserted violations of copyright, or of patent rights. In cases of this sort, the Court will look to the whole circumstances, and will continue or dissolve the injunction, in the exercise of a sound discretion.

He says, further, "I confess that I should be sorry to find that any such practice had been established as that a special injunction should be dissolved upon the mere denial by the answer of the whole merits of the bill. There are many cases in which such a practice would be most mischievous—nay, might

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be the cause of irreparable mischief. The true rule seems to be that the question of dissolution of a special injunction, is one which, after the answer comes in, is addressed to the sound discretion of the Court."

The answer to a bill is regarded as true until disproved, and it is a general principle of law, that an injunction will not be continued when it denies all the equities of the bill. (*Hoffman vs. Livingstone*, 1 John. Ch., 211 ; 4 H., 26.) Neither will it be continued when the answer defeats the grounds upon which the injunction was based. (*Orr vs. Littlefield*, 5 Woodbury & Minot, 13.)

The answer responds to the bill positively in all its material allegations. It denies the allegation of trust, of receiving the conveyance for a nominal consideration, but positively alleges a purchase for a valuable consideration, and that he gave notes for \$15,000, secured by mortgage of the property. In fact, he denies every material allegation in the bill ; and, therefore, the dissolution must be declared, unless there are some extraordinary circumstances in the case. This is not a denial by a party having no personal knowledge of any of the material facts, but by one who has actual knowledge. As the case stands, the answer disproves the case made by the bill ; for to sustain a bill against an answer which is responsive to the charges of the bill, it must be overcome by the testimony of two witnesses, or of one, and other stringent corroborative circumstances.

It is contended by the counsel for complainant, that the injunction should be issued on the ground of irreparable injury. The bill and answer are so decidedly in conflict, that the Court cannot so far prejudice the case as to interfere with the control and management of the property upon them alone. In cases of this character, to which the counsel refers—such, for example, as the celebrated case of *Poor vs. Carleton*, the answer was made from information and belief, and affidavits filed, showing to the Court that it would be dangerous to have certificates for money in the hands of the respondent, on account of want of responsibility. But I know of no case in equity where title is in controversy that an injunction is continued under the state of facts as exhibited in this bill and answer. It would be in direct conflict with the general principles applicable to pro-

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ceedings in equity, that the answer can be overcome only by one witness, and circumstances in corroboration.

The counsel contends further, that the probabilities are with the complainant upon the bill and answer. This is not a sound principle upon which to rest an injunction, and the authorities do not sustain this position. If by the bill and answer questions of law were involved of a doubtful character, the injunction should be sustained ; but I am not aware of any question of law arising in the case, if the answer is not overcome.

Reasoning upon principles which govern Courts both in law and equity, when there is a positive, direct, and palpable issue, as in this case, the burden is upon the complainant to sustain his case, and without motion on his part, his case fails ; and, therefore, on such an issue, without further proceedings, the probabilities must be considered in favor of the respondent.

The counsel has referred to the analogies of the proceedings at law, in imposing restraint in the disposition of property, as analogous to an injunction in equity. The statute has authorized it in cases of fraud, in a suit at law, or where the party is about to remove the property out of the Kingdom. But in proceedings in equity no such principle has been introduced into the Civil Code ; and, therefore, the Court is bound to regard the course of proceeding recognized by the authorities in equity practice, which do not sustain this position.

The counsel contends that no injury could be done to defendant by keeping the injunction on the estate. This may or may not be true ; still every man is entitled to his legal rights ; and if, under the law, the complainant has no right to restrain the respondent in the management of the estate, the Court should not authorize it. I agree with the counsel that it is not a universal rule that an injunction is dissolved on a denial of the equities in the bill. It depends upon the state of facts alleged in the answer, and whether they are derived from information and belief, or positively from personal knowledge, and whether they are a direct and explicit denial of the allegations in the bill, as they are in this case. There may be other reasons which should influence a Court in cases of this character, as were shown by affidavits in the case of *Poor vs. Carlton*.

The issue between the parties is palpable and direct, and the

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material allegations of the bill are denied from personal knowledge, and not from information and belief; and as they are yet unsustained by any testimony, but are in direct conflict with the answer, I am of opinion that the injunction must be dissolved.

Injunction is dissolved with costs.

Mr. Harris for complainant.

Messrs. Montgomery and Bates for respondent.

August, 1862.

SUPREME COURT—IN EQUITY.

ISAAC MONTGOMERY *vs.* DANIEL MONTGOMERY.

A, THE OWNER of a valuable estate, conveyed it to B for a nominal consideration, to be held in trust by the latter for the benefit of the complainant, the aforesaid A—B to manage the same, and to receive for his compensation as manager one-third of the profits arising from the estate, and the complainant the remaining two-thirds. B, after holding the estate for a term of years, at the request of the complainant, executed a deed, also for a nominal consideration, to C, the complainant's brother, the respondent in this suit, the *habendum* in the said deed, reciting that C was to hold the property *in like manner as B had held the same*. There was a verbal agreement that the complainant should draw from the receipts of the estate a certain sum per month, and that the respondent should receive for his services one-third of the profits of the business, and complainant two-thirds; the monthly payments to be accounted for on the final settlement. The respondent paid the monthly stipend for a space of time, but made no settlement; latterly, the respondent refused to pay the complainant anything, and denied that he had any interest in the estate.

The complainant prays that an account may be taken, and the amount due him ascertained, and the respondent decreed to pay the same, and that he be ordered to convey the estate to the complainant.

Held: that a resulting trust may be established by parole evidence, although the grantee denies the trust in his answer; but the evidence must be full, clear and satisfactory.

The general rule of law is, that parole evidence is not admissible to create or modify interests in real estate, except in cases of fraud or mistake. But

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trusts, resulting by operation of law, are expressly excepted from the statute of frauds.

A trust may be established, when the consideration of a deed moves, as in this case, from the complainant, and not from the grantee; and the facts on which the trust arises may be shown by parole proof, in opposition to the language of the deed.

The trust being proved, parole evidence is also admissible to define its nature and operation.

The *cestui que trust* is regarded, in a Court of Equity, as the real owner, for the beneficial interest vests in him; and the respondent purchasing the estate with the knowledge of the trust, the conveyance would be subject to it.

The beneficiary has a right in equity to dispose of the estate, and such disposition is binding on the trustee.

The main question in determining whether the trust has been created, is upon the sufficiency of the evidence by which it is sought to be established.

The *cestui que trust* having resumed the legal ownership of the estate from the hands of the first trustee, and directed to whom a fresh conveyance should be made, without consideration: Held, that a resulting trust arose in favor of the complainant.

Respondent decreed to convey the estate and render an account of his administration.

ALLEN, C. J.

An abstract of the bill and answer have hitherto been given by the Court on questions which have arisen in the progress of the investigation, and, therefore, I shall only advert to the allegations, as they involve questions material to the issue now presented.

The complainant avers that he conveyed to Charles W. Vincent, for the nominal consideration of \$8,000, on the 4th of September, 1849, an estate on the Island of Oahu, called the Puuloa Salt Works; the design being that Vincent should hold the estate in trust. And it is alleged in the bill that the stock and furniture were purchased by the complainant or by his funds; and further, that the estate was mortgaged by said Vincent to B. F. Angel for the sum of \$5,000, and that the money arising therefrom was received by the complainant and said Vincent, and that the latter gave his note for the amount he had received to the respondent, who, on the 20th of July, sued said note and recovered judgment thereon; and further, that said mortgage was paid by raising money on the estate. He further avers that he invited his brother, the respondent, to come to this

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country, where he arrived on the 17th February, 1855, and that he paid his passage, for the respondent was in destitute circumstances ; and that on the 20th June of the same year said Vincent, by the request of complainant, executed a deed to the said respondent of the estate for and in consideration of \$15,000 (fifteen thousand dollars) ; and he further avers that the consideration was nominal, that no money was paid to Vincent by respondent, that he was at the time without means, or credit, and that the object of the deed was that the estate might be held by him for the benefit of the complainant, who says that there was a verbal agreement with his brother that he should draw from the receipts of the property one hundred dollars per month ; and that at the end of each year, the respondent should receive for his services one-third of the profits of the business, and the complainant two-thirds ; and that the one hundred dollars per month was to be accounted for on final settlement ; that the respondent continued to pay him money, but no settlement has been made ; but of late he refuses to pay him anything, and denies that complainant has any interest in the estate ; and the complainant further alleges that it was expressly understood and agreed, that when he might desire it, the said estate was to be conveyed to him, or to whomsoever he might direct ; that he has made repeated efforts for a settlement, but without success ; that the respondent has offered only to give his notes, secured on the estate for ten thousand dollars, payable in seven years, which he regards as wholly inadmissible, as the estate cost him fifty thousand dollars, besides many years of toil and care, since 1842.

The complainant prays that an account may be taken of all the dealings and transactions of the respondent touching the Puuloa Salt Works, from the 19th of June, 1855, till the day of filing this bill, that the amount due the complainant may be ascertained, and that the respondent may be decreed to pay the same ; and, also, that the said respondent may be ordered to convey the estate to the complainant.

The respondent admits in his answer that the conveyance of the property was made to Vincent, and believes that the consideration of eight thousand dollars is correct ; but does not know whether the estate was held in trust or not, or whether

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it was conveyed to enable Vincent to manage the property better for complainant's interest, but believes it to be untrue.

He denies that he came to this country in destitute circumstances, for he was skilled in the art of ship-building, as well as having general business qualifications, and with sufficient means at his command to establish himself independently of his patronage; and he further says that he does not know whether said deed from Vincent was executed at the request of complainant, but denies that the sum of fifteen thousand dollars, as stated, as a consideration in said deed, was merely nominal, but states that it was the price at which he purchased the estate of said Vincent, who sold him the same on time, secured by his negotiable notes and mortgage of the estate; and he denies further that the intent and object of the conveyance was that he should hold the estate for the use and benefit of complainant, or for the purpose of enabling himself to manage it with more facility, for the use and benefit of complainant.

Defendant further says he has no "personal knowledge whether the complainant, as in bill alleged, continued until the 20th of June, 1855, to enjoy a large or any portion of the proceeds of the said estate, or whether the same, if true, was, or was not, according to an agreement in bill alleged, as between the complainant and the said C. W. Vincent; or whether the said Vincent in fact held the estate in trust for the use or benefit of the complainant, as in bill alleged; or whether said writing was made for the purpose of enabling the said Vincent to manage the said estate more effectually for the use or benefit of the complainant; or whether the said Vincent received for his alleged management one-third or any other, or what part of the proceeds, of the said estate, but saith this defendant is credibly informed, and verily believes, and therefore avers, that all the said above last-mentioned statements and allegations are without any foundation in fact, and were never alleged by the complainant, in any of the intercourse between them, since defendant arrived in this Kingdom." He further avers that he supposed the furniture was Vincent's, because complainant never made any claim to it; and that the stock of cattle referred to were sold by order of complainant, and purchased by respondent. He says further, that the mortgage to Angel was made by

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him as the sole and *bona fide* proprietor, and denies that Vincent gave him a note for any part of the loan. The note was for another consideration.

The respondent denies that he holds the estate in trust, and avers that he purchased it for fifteen thousand dollars ; that he paid no part of the consideration at the time, but that he has since paid large sums of money to the complainant. He denies further that he was under obligation to convey to complainant, on request, or to any one else, whenever he might direct, and denies all efforts at settlement. The complainant replies that he does not know whether the mortgage and notes for fifteen thousand dollars were executed, or whether they were delivered to him, as at the time he was in great mental trouble ; but avers if such papers were signed they were merely for form, and no such mortgage is now recorded ; and that for the space of one year from the 3d day of October, 1855, the defendant had possession of all repliant's papers ; and if such papers were executed, their present existence is unknown to this repliant, and if any exist, are in the possession of defendant. The repliant further says that the cattle referred to in the answer were offered for sale, but there being no purchasers, the cattle were bought in by the respondent, and no money was ever paid by defendant or received by complainant.

The counsel for the complainant avers that Vincent held the estate in trust for him, with the understanding that he would convey it to whomsoever the complainant might direct, and that in pursuance thereof, he made a conveyance to the respondent, to be holden for complainant as Vincent had held it, and that the respondent has been in the same relation as trustee.

The counsel for the respondent contends that, as the deed is absolute in its terms, a trust cannot be established by parole testimony.

It is a general rule of law that parole evidence is not admissible to create or modify interests in real estate, unless in cases of fraud and mistake. But trusts resulting by operation of law are expressly excepted from the operation of the statute of frauds. The doctrine that a trust may be established when the consideration of a deed moves, as in this case, from the complainant and not from the grantee, is fully sustained by Chan-

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cellor Kent in the case of *Boyd vs. McLean*, 1 Johns. Ch. R., 582; as when A purchases an estate with his own money, and the deed be taken in the name of B, a trust results by operation of law. This is a well known and a universally admitted rule in equity. The point raised is whether such a trust be within the statute of frauds, and whether the facts on which the trust arises may be shown by parole proof, in opposition to the language of the deed, and in opposition to the defendant's answer. The trust must result from the facts proved. (*Botsford vs. Burr*, 2 Johns. Ch., 405; *Dow vs. Jewell Foster*, 470; *But Root vs. Blake*, 14 Pick., 27.) When the trust is proved, parole evidence is admissible to define its nature and operation. (4 Bran. Ch., 472.)

It is often a very difficult question to determine what facts will create a trust by operation of law. (*Pembroke vs. Allenston*, 1 Foster, 107; 13 John., 463; *Jackson vs. Mills*; *Boyd vs. McLean*, 1 Johns Ch., 272.)

The statute of frauds declares that "all declarations or creations of trusts and confidences of any lands, etc., shall be manifested and proved by some writing signed by the party, who is, or shall be by law, enabled to declare such trust, or else they shall be utterly void." The statute, however, excepts the case when any conveyance shall be made of any lands, etc., by which a trust or confidence shall arise or result by implication or construction of law.

In the case of *Botsford vs. Burr*, 2 John Ch. R., 408, Chancellor Kent says that such a resulting trust may be established by parole proof, and the difficulty in all this class of cases is whether the facts make out a resulting trust. In all cases where the money is paid by one person, and the deed taken in the name of another, a resulting trust arises; but if the party did not pay the money, he cannot be permitted to prove that the purchase was made for his benefit, or on his account. The trust may be established by parole, although by the deed an acknowledgment is made that the money was paid by the nominal grantee. (*Foot vs. Calvin*, 3 Johns, 216; *Suthrie vs. Gardner*, 414—19 Wendall; *Lowusburg vs. Purdey*, 16 Barber, 376; *Peabody vs. Turbill*, 2 Cushing, 236; *Lynch vs. Cox*, 11 Johns, 265; *Buck vs. Pike*, 2 Fairfield, 9, 23; *Baker vs. Vining*, 30 Maine, 121, 125; *Smith vs. Burnham*, 3 Sumner, 435, 438.

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I regard it settled by the authorities that a resulting trust may be established by parole evidence, although the grantee denies the trust in his answer ; but the evidence must be full, clear and satisfactory. (3 Story, 181 ; 2 Story's Eq., 68 ; Hill on Trustees, 91 ; 1st Leading Cases in Equity, 274—note and authorities there cited.

The *cestui que trust* is regarded in a Court of Equity as the real owner, for the beneficial interest vests in him. So that if the respondent had purchased the estate with the knowledge of the trust, the conveyance would be subject to it. He has a right in equity to dispose of the estate, and any disposition made by him is binding on the trustee. (Root vs. Blake, 14 Pick., 271.)

As early as the time of Lord Hardwicke, in the case of Lloyd vs. Spillot, 2 Atk. R., 150, the principle of a resulting trust was recognized as arising by operation of law, where an estate was purchased by one person and the consideration was paid by another. He who pays the consideration is regarded in equity as the owner. He went farther in the case of Willis, 2 Atk., 72, and was of opinion that parole evidence might be admitted to show the trust from the poor circumstances of the pretended owner of the real estate or inheritance, which made it impossible for him to be purchaser. (Linch vs. Linch, 10 Vesey, 518.) And this doctrine is equally applicable to personal as well as real estate. In the case of Dyer vs. Dyer, 2 Cox, 92, Lord Chief Justice Baron Eyre says that "the clear result of all the cases, without a single exception, is that the trust of a legal estate, whether freehold, copyhold or leasehold ; whether taken in the names of the purchaser and others jointly, or in the names of others without that of the purchaser ; whether in one name or several ; whether jointly or succession, results to the man who advances the purchase money, and it goes on a strict analogy to the rule of common law, that where a feoffment is made without consideration, the use results to the feoffor."

Mr. Justice Story says that this principle was recognized in a very short time after the passing of the statute of frauds of 29 Charles 2d, in an anonymous case in 2 Ventris, 361, and that the doctrine of that case has never been departed from, but has been recognized in a great variety of decisions. The ques-

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tion whether parole evidence is admissible to establish the manner of paying the purchase money, has been involved in doubt. But Justice Story and Chancellor Kent, after a very thorough examination of the subject, have decided that parole evidence is admissible to ascertain the trust. The same doctrine is maintained by the English authorities. The trust arises upon the ownership and payment of the money, and not upon a contract entered into on the part of the trustee. (*Pritchard vs. Brown*, 4 N. H. Rep., 410 ; 4 Kent, 305 ; 2 Story's Equity, § 1201.)

Chancellor Kent says, that a trust is merely what a use was before the statute of uses. It is an interest resting in conscience and equity, and the same rules apply to trusts in chancery which formerly applied to uses, and in exercising its jurisdiction on executory trusts, the Court of Chancery is not bound by the technical rules of law, but takes a wider range in favor of the interest of the party. (*Fisher vs. Fields*, 14 John. R., 505.

A more difficult question than one of law arises on the sufficiency of the evidence to establish the trust, as alleged by the complainant. A careful analysis of the testimony is necessary to form an opinion upon this very important point. Mr. Vincent testifies "that in 1848 he loaned the complainant \$5,000, who gave him security on the lease which he then held of the Puuloa Salt Works and the salt there manufactured. The complainant went to California in 1848, and on his return in 1849, he purchased the title of the estate, and he conveyed it to him to secure the original loan, and a further advance, making the amount \$8,000. And it was agreed at the time that he was to have one-third of the profits for his superintendence, the complainant one-third, and complainant's wife one-third; and it was distinctly understood, that on the payment of the \$8,000 and interest, he was to re-convey the estate." He says further: "We made a settlement in 1853, and I received full payment of complainant's indebtedness, and then desired to re-convey the estate. I received one-third of the profits for managing the estate. I considered the estate sacred, and I made provision to protect the complainant in my will. I thought the estate worth four times the amount he owed me. After my settlement

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with the complainant, the title remained in me for about one year and a half, and I expressed a wish to complainant to re-convey the estate to him, and the complainant replied, 'Oh, let it remain.' I mentioned the same thing to him again and again, and his answer was always the same. I thought the estate had better remain in my hands, as complainant was at that time intemperate, and sometimes his conduct was imprudent." Witness says he had rescued him from many troubles, that he felt the responsibility of the trust, and desired to get rid of it. However, the title remained in him till the arrival in this country of the respondent, and Isaac then said to him after introducing his brother, "I will now take the deed of the land, and in preparing the deed, insert my brother's name in place of my own, and set the sum in the deed at \$15,000." He applied to Judge Harris, and he drew the deed for the land and the mortgage, and three notes of \$5,000 each at six, twelve and eighteen months. The notes and mortgage, I am under the impression, were made for the purpose of blinding Mr. Harris, the object being to put Mr. Daniel Montgomery in trust, and lead people to believe he owned the estate." He goes on to say, "I think I delivered them to the respondent. I did not endorse the notes or assign the mortgage. I had no negotiation with the respondent about the estate, and never received any money from him, or any one else, for the Puuloa Salt Works."

The household furniture on the estate, at the date of the deed to him, belonged to the complainant and his wife ; that he never claimed to own it ; that there were also cattle, horses, carts and canoes belonging to him ; that there was also a large amount of lumber on the estate, and a large amount of goods belonging to the complainant, when he conveyed it to the respondent. It was the season for the manufacture of salt, and the goods were required to pay the natives for their labor. That there was a schooner belonging to complainant which was worth \$2,000, and the respondent six or eight months ago, came and asked him for the papers of the schooner, to which he replied that he had none, but thought that he would find them among the complainant's papers. That respondent replied that he had made search and they were not there. He referred him to the Registrar's Office. Respondent then said that he intended

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to send her coastwise for wood, and that he could not send her without her register. That respondent then requested him to accompany him over to the Registrar's Office and there acknowledge the transfer of the schooner. That he did so, thinking of course, whether he went with Daniel, Isaac or his wife, it was the same. "The respondent never paid me one cent for the vessel. When I made the loan of \$5,000, the complainant held the property under a lease from Kekauonohi, and my security was a mortgage of the leasehold property as well as the salt at that time manufactured. After the complainant purchased the property, I returned the mortgage to him and made an additional advance, which, together with the interest, amounted to \$8,000, to secure which the complainant conveyed the estate to me." Mr. Vincent further says Mr. Jasper recommended him to take this course, as the most proper one. It was by his advice that he took the absolute conveyance, and by that deed he was proprietor of Puuloa. He says "I did not consider that I had a right to dispose of it. I held it as a trust for complainant. I supposed I acted as his trustee. He was aware when he made the mortgage that he did so for the \$8,000. It was so mutually understood. During the time I held the title in 1854, I negotiated a loan of Mr. Angel for \$5,000, at the request of the complainant, and mortgaged the property to secure it. We divided the money equally, and after final settlement and delivery of a deed of the estate to respondent, I gave him my note for the amount."

The witness then makes a statement in relation to the management of the estate by him, and its comparative condition when conveyed to the respondent, with the present time, as conducted by the respondent. Mr. Vincent is asked whether he has not declared to respondent, that Mrs. Montgomery, wife of complainant, has said to him (Vincent) that if Isaac got the property he should get half of it. He denies having any conversation with him (Mr. Bates) in regard to any conversation with Mrs. Montgomery about the property, and he denies having had any with her about it. He is interrogated in relation to a conversation with R. G. Davis, Esq., who was retained as counsel for the respondent, and he says that he does not remember that he stated to him, or any other man, that the wife of

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complainant had been to him with tears in her eyes, beseeching him. He says Mr. Davis called on him, and after some preliminary conversation, touched upon this case, and inquired his opinion of the party he thought would win. The witness replied that Mr. Bates, Mr. Harris and Mr. Montgomery had called upon him, and that he had refused to speak to them, and that he should decline to speak to him upon the subject. He further says that he did not say to Mr. Davis that he was a poor man, or having large medical bills to pay, or that he was of more consequence in the suit than all the lawyers engaged in it. Neither did he state that he should like employment at Puuloa, if the respondent succeeded in the suit. He did not say, by sign, symbol, word, token, or by any other sign, that if a large fee was placed at Mr. Davis's disposal for his benefit, that it would be for respondent's advantage, or anything to that effect. He denies having stated to Daniel Montgomery that he wanted pay. He further testifies that the respondent had made propositions to him of subordination, at his own house, and shortly before the arrival of the "Speedwell" on her last trip. He stated that on her arrival he expected to be in funds from a large shipment he had made, and would give him \$1,000 if he would favor his cause. He spoke to him of the three \$5,000 notes. He says he made no reply when the respondent offered him the \$1,000. The respondent was impressing witness' mind thus. He said to him, Vincent, "You sold Puuloa, and I gave you in payment three notes of \$5,000 each. You gave those notes to the complainant, with your endorsement on the back. Those notes I have since paid, and if they are not paid, let him, Isaac, produce them." "Now," says Vincent, "I was to support him in that, and for my support I was to have \$1,000. I did not support him, for I prefer to speak the truth in this Court among men. I have never communicated this to any one until to-day on the stand."

Mr. Vincent further says: Mr. Bates called on him and handed him the bill in this case, and we had some conversation in relation to the note, and I told Mr. Bates I thought the note was given for a house and lot in town and a schooner, but, he says, I was in doubt at the time. A short time afterwards Mr. Bates called again and read the answer. I then told him that the

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note was given for my part of the Angel money ; for on reference to my books I found that the house had been settled for by lumber and cash. This testimony is contradictory to the answer, and if the respondent received the note for any other consideration he has failed to show it. In either case, whether the note was given for the money received from Angel, or for the house and lot and schooner, the consideration was from the complainant, therefore I do not see that it is material, except on the score of credibility. The witness has given the best evidence of the transaction, relying upon his memory and his books ; and the respondent has failed to give any support to this averment in his answer. The weight of evidence, as it stands, is clearly for the proposition that the note was given for moneys received of Angel. He says that the respondent was to hold the property as he held it, and that he was to take three notes for \$5,000 each, and a mortgage. The notes were signed, and he took all the papers, notes and mortgage and gave them to Isaac Montgomery. His conversation in relation to the negotiation was entirely with Isaac. The mortgage was made to him in the ordinary form. I have never seen the mortgage and notes since.

Mr. Davis testifies that Vincent stated that he had nothing to gain by this suit, if it went either way, and thought that the only benefit he could derive would be employment in the line of his business, on the property, and it may be that I conveyed the idea to the minds of my associates. I cannot say that Vincent stated he was of more consequence than all the lawyers. I do not recollect of having made such a statement to others. I have never insinuated that Mr. Vincent had stated to me that he wished money placed at his disposal, and I never gave assent to a question involving this to Mr. Bates or Mr. J. Montgomery. I had a general conversation with these gentlemen, and told them that I thought Mr. Vincent's testimony would be adverse to our client. He then stated to Mr. Bates, there is one important matter in this case which I will disclose to you confidentially, that \$1,000 has been named as the price of Vincent's testimony, and Mr. Bates said, Yes, that is what I wanted to know about. I said, then, Mr. Bates, I wish you to understand that I named it to my colleague, Mr. J. Montgomery, but

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the proposition did not come from Vincent. Montgomery replied, Yes, it was named to me by you, but not as coming from Vincent. Mr. Bates asked me whether Montgomery did not think it came from Vincent. I replied that Mr. Montgomery might have received that impression, rather than that I conveyed it. I infer that he might have received that impression from the fact that my colleague, Montgomery, afterwards told me that the respondent said that he had given Vincent \$300. Mr. Davis said that Mr. John Montgomery had called on him to put him right with Mr. Bates, in relation to the interview at Mr. Bates' office, between all the counsel and the respondent. Mr. Vincent stated to me that Mr. Daniel Montgomery had said to him that if he wanted \$1,000 to use, he would let him have it. I asked him if it was not in the light of a loan, and he replied, perhaps it might be so. I did not then regard the statement of Mr. Vincent as a declaration that respondent had attempted to bribe him at that time. I told the respondent what I had learned from Mr. J. Montgomery, that he had given Vincent \$300. I never told what Vincent had said. I never told it to Mr. Bates as associate counsel, for I did not know what to think of it. I asked respondent whether he had given Vincent \$300, and he replied that he had not given him \$300, but had loaned it, and had his note for it. I do not remember that there has been any discussion with the counsel and respondent about the \$300 or the \$1,000.

Mr. Vincent states, in his cross-examination, that the respondent had stated to him that he was not sure whether to prosecute for the whole estate, or for services rendered for seven years. The respondent was very severe in his remarks on his brother, but he advised him to a milder course. He never stated to him that he would succeed in his suit, or advised him not to compromise it. And Mr. Davis testified that Mr. Vincent never said to him that if respondent got the salt works he would be glad of employment there ; and that he never stated to any one that Vincent had so stated. Mr. Vincent never signified by sign, symbol or token, that if a large fee was placed in my hands for him, that it would be for the respondent's benefit. I never stated this to any one. I have never been charged with any such thing. I have been asked by my associate counsel whether

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I have not made such a statement. Mr. Vincent said, all the counsel and the parties have called on me for the purpose of having a conversation on the subject matter of the suit. He said to me that Mrs. Montgomery, the wife of complainant, had been to see him ; she was an intimate acquaintance of his wife. He said that she had said to him, " Charles, let us have the property." He said, all I could say to her was, that he had not the power to give her the property, and she repeated her solicitations, without appearing to understand what I had said to her. She replied, if you will give us the property, we will give you anything you may want, and you may have half of it. Mr. Vincent said to her she was *hewa* (wrong) to talk in that way. and that all he had to do was to speak the truth. He said that the woman appeared to be out of her head. He never intimated anything about a reward, after he had spoken of the case. He told Mr. Vincent that if he declined to give me any light on the case, he should not press it. Vincent added that he had no partiality for either of the parties, and that he thought there was no one who knew so much of the case as he did. There was some other conversation, and he stated he had sickness in his family of late years, and that his physicians' bills had been very large. I never made any suggestion that he, Vincent, could be bought. I never stated that a large sum would buy Vincent.

Mr. Bates, counsel for respondent, testified that his client informed him that Mr. John Montgomery, associate counsel, had stated to him that Mr. Davis had said that Vincent had made a proposition that for \$1,000 his testimony should be favorable to respondent, and at a meeting of counsel and client, the question was put to him whether he had made such a communication. and whether Mr. John Montgomery had proposed to Mr. Daniel Montgomery to deposit with him, Mr. Davis, \$1,000, which was to be retained by him to abide the issue of this suit, for the benefit of Mr. Vincent, to which Mr. Davis replied, " That is false." Solicitor Montgomery was excited at this reply because he had understood Mr. Davis differently, and said, " Robert! I can't stand that." Mr. Bates further testified that Mr. Solicitor Montgomery said to Daniel, in his presence, that he had told him that he, the respondent, had given \$300, and that the re-

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spondent replied that is not true. I did let him have \$100. He came to me in distress, and I loaned, or gave, (witness does not remember the word used,) him \$100. Mr. John Montgomery re-asserted the statement as made by the respondent, who stated further that Mr. Vincent had applied to him for aid, and he had stated to him that he did not know how he was going to be situated, but "if I can I will help you." The respondent said he had been advised to make this communication to witness, in relation to the statements alleged to have been made by Mr. Davis about Vincent's testimony.

Solicitor Montgomery testifies that Mr. Davis did not use any expressions in conversation with him that Vincent could be induced to give evidence either on one side or the other, by any valuable consideration ; but the impression left on his mind was that, as Vincent had talked about getting half of Puuloa, and as the respondent told him so, as well as Mr. Davis, and his remarks in relation to hard times, I inferred that \$1,000 was in some shape or way a sum which Mr. Davis thought might operate on Vincent's testimony. He felt there was a risk of Vincent being induced to deviate from the truth, which, from Mr. Bates' statement, were on respondent's side of the case. Solicitor Montgomery then made a communication to his client, of the impressions he had derived from Mr. Davis. He stated to his client that it appeared to him that Vincent expected some inducement to keep him on the right track in his testimony, and he thought \$1,000 was the inducement, to which the respondent replied : "I have paid that man \$300, and I can't afford it."

Solicitor Montgomery says he expressed surprise at this course. These remarks of Mr. Davis were undoubtedly the cause of this idea in the mind of the solicitor that Vincent was open to a bribe. The solicitor was interrogated whether he had not stated that Vincent wanted \$1,000 for his testimony, and whether the respondent was not a fool not to give it. He replied that his client had given \$300, as he said, and which he had no reason to doubt, and that increasing the sum was not increasing the offense, and that he had said jocularly "that he might as well go the whole hog." He denies explicitly that he ever advised respondent Montgomery to make the overture.

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The witness further says: That "when he said at the interview of the counsel and client, 'I can't stand that, Robert,' I was under the impression that Mr. Davis meant to convey a denial that he had made any communication to me on the subject of his interview with Vincent, and I did not refer to the statement of \$1,000 being deposited with Mr. Davis for Vincent's benefit. Mr. Montgomery says he desired Mr. Bates to accompany him to Mr. Davis's house, for the purpose of having Mr. Davis correct what he thought was unjust toward him, in the statement made by Mr. Davis in Mr. Bates' office, which I understood to be a denial that he had communicated anything to me about Vincent, and the \$1,000, so much talked about. This interview was had, and explanations made, and whatever misunderstanding existed in relation to the offer of \$1,000 was removed by Mr. Davis by the declaration that the proposition did not come from Mr. Vincent, to which Mr. Montgomery replied: 'Yes, it was named to me by you, but not named as coming from Mr. Vincent.' "

The first question which arises is, whether any of the facts disclosed create doubts as to the truth of the testimony of Mr. Vincent; for if a man has accepted, or offered to accept a bribe, his evidence can have no weight with the Court, unless fully sustained by the most reliable witnesses, or by circumstances of the strongest character.

That Solicitor Montgomery made this impression on the mind of his associate counsel, Mr. Bates, is undeniable. But had he any ground for entertaining such an opinion of Mr. Vincent? Mr. Davis attempted to have a conversation with Mr. Vincent in relation to his knowledge of the facts involved in this case, and of the character of the testimony which he would give, but he studiously avoided it. The introduction to the conversation is not material; although, it may be remarked, that it was more Masonic in its tone and manner than professional. It appears that they were early friends, and that they entered upon a very free conversation on their private affairs, of their business, of their personal condition. Mr. Vincent said his business was poor and times were hard. In the course of the conversation he said that the respondent had stated to him if he wanted a thousand dollars to use he would let him have it.

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Thereupon Mr. Solicitor Montgomery infers that he wants money for his testimony, and so states to the respondent, who communicates it to Mr. Bates. But, when this understanding of Montgomery is communicated to Mr. Davis, he indignantly repudiates it, and says that no such intimation had been given by Vincent. The question arises, then, has not Mr. Davis made different statements of the same transaction? He denies emphatically that Vincent had offered him his testimony for \$1,000; when the conversation was had between the counsel and respondent, Solicitor Montgomery says that from Mr. Davis' account of the interview he inferred that Vincent wanted a consideration for his testimony, and that \$1,000 would be the inducement. The deductions made by Solicitor Montgomery were not logical. In a private conversation with an old friend, a man may be permitted to talk of his reverses and his misfortunes without being thought to have made an implied overture of money for his testimony.

The account given by Mr. Vincent and Mr. Davis, under oath, of the interview, is perhaps as near in conformity as is usually made. They agree in all the material points of the conversation, with the exception of an appeal made by Mrs. Montgomery, wife of complainant, to save the estate for them; and my own view is, from a very careful examination of this testimony, that the testimony of Davis has been consistent with the declarations made by him to his associate counsel. Mr. Montgomery drew inferences which were not legitimate; and there is no propriety that Mr. Davis should be answerable for them. There is certainly no ground for the opinion that Davis had changed his version of the conversation to shield Vincent from the charge of having made overtures for his testimony.

In connection with this discussion upon Mr. Davis' testimony, it is well to recur to Vincent's, for the purpose of testing its accuracy and truth. He had the title of the estate for about 6 (six) years, and had charge of the business for about four. His books give a clear history of the transactions of the Puuloa Estate. His memory is as sound and retentive as could be expected of events which transpired so long ago. He has answered freely and fully every question which has been put to him. His settlement with his *cestui que trust* seems to have been entirely

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satisfactory. His regard for the sacredness of the trust, by providing for it in his will, made especially for that purpose, was highly honorable to him. I see no act of his, in this whole transaction, of trick or artifice to retain the estate, or obtain any interests or rights adverse to the *cestui que trust*. He had the fullest confidence of the complainant, judging from the time and the manner in which he held the estate, for he had repeatedly urged him to take a reconveyance. In his tone and manner on the stand, he has not exhibited any partialities, but throughout has given full, free and frank statements upon all matters upon which he has been so elaborately interrogated. His testimony has, in many instances, been sustained by collateral evidence, and is consistent with itself. His administration of the trust was honorable to him as a man of business and a faithful fulfillment of its sacred obligations; and in my own view, his testimony is worthy of full credit for honesty of intention and for as great accuracy as can usually be given to events which transpired so many years ago.

When Solicitor Montgomery made known to his client the impressions he had derived from Mr. Davis, that Vincent expected some inducement to "keep him on the right track" in his testimony, and he thought \$1,000 was that inducement, his client stated to him that he had given Vincent \$300, and could not afford to give more; instead of discussing the comparative criminality of the offense of bribery, whether the sum was more or less, it was his imperative duty to have denounced such conduct. It was not an occasion to be jocular, or for a counsellor of the Court to indulge in trifling remarks upon this the most serious of all subjects connected with proceedings in a Court of Justice. It is, indeed, trifling with serious things. It is the duty of counsel to aid in the investigation of a suit, and to keep the sources of information free from corruption, and the Court cannot for a moment entertain a discussion of the morality of giving a consideration to a witness, to induce him to tell the truth. It is corruption itself; and the man who would receive money to tell the truth, would receive money to tell a falsehood, and there could be no reliance upon his testimony in either case. Mr. Montgomery has always sustained an honorable position at the bar, and the Court do not believe that he would seri-

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ously entertain, or advise a client to entertain, a proposition of this character. The honor of the bar must be sustained by an upright practice, or the course of legal investigation will be liable to be impure, and dangerous to the rights of parties. Should a case be made out of a violation of this principle, it would be the imperative duty of the Court to strike the name of the offender from the roll. The evidence of the counsel for respondent is not material, any further than it bears on the testimony of Mr. Davis. Even had he made different statements of the conversation with Vincent, he sustained Vincent in Court, under oath. The statement out of Court should not have weight against his statement under oath, so far as it conflicts with Vincent. It would cast a shade over his own testimony, but would not in the least affect Mr. Vincent, although, as I said before, I do not perceive any such discrepancies as would invalidate the testimony of either. The difference arose from a misinterpretation of the extent and force of his remarks. But on this account the testimony of Mr. Vincent should not be weakened. When a witness has stated what another witness has said, and in Court, under oath, gives a denial to such statement, or a different version of it, it should be received with very little credit, and it cannot affect unfavorably the testimony of the other. In view of the testimony given by all the counsel, the Court is unable to perceive that it lessens in any degree the weight to which the testimony of Mr. Vincent is legitimately entitled. His credibility is in no degree impaired by it. Much of this testimony would have been excluded, had exceptions been taken to it; but it was admitted in conformity with the wishes of counsel of respondent, and in the case of Mr. Davis of the respondent himself.

The respondent was invited to visit this country, and he arrived here in 1855, in the 22d year of his age; and it appears by his answer that he had been educated in the art of ship-building, as well as having general business qualifications, and with sufficient means at his command to establish himself independently of complainant's patronage. It is in evidence that on his arrival, the complainant furnished him with the necessary clothing proper for the climate; and it is alleged in the bill, and not denied, that the complainant paid the respondent's

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passage from England. There is no evidence that he had any means to establish himself in the business of a shipwright.

Respondent states in his answer that he does not know what consideration Vincent paid for said property, but believes it to have been \$8,000, as stated in the deed, and that said sum was *bona fide* paid by said Vincent to, and received by, the complainant, in consideration of the sale of the Puuloa estate by the said Vincent to complainant.

He further says that he does not know whether the deed from Vincent to him was executed at the request of complainant.

It is very clear that on his arrival, the respondent regarded Puuloa as complainant's estate; and Vincent testifies that "for some year and a half he had often expressed the wish to reconvey the estate to complainant, but the title remained in him till the arrival of respondent;" and Isaac then said to him, after introducing his brother, "I will now take the deed of the land, and in preparing the deed, insert my brother's name in place of my own. He had no negotiation with the respondent about the estate." It appears, under his own hand, that he regarded the Puuloa estate as his brother's, on his arrival; and is it in the nature of things, that the respondent, coming here at the invitation of his brother, and at his expense, and immediately entering in aid of his brother on the management of the estate, that he did not know something of the nature of his brother's interest? If he regarded Vincent as the owner in fact, he must have been struck with the singularity of the interview as detailed by Vincent. It was a very summary mode of negotiation, certainly. On the hypothesis that Vincent was the owner, and he was the purchaser, and especially when he found that he could make the purchase on six, twelve and eighteen months, without an advance payment. It is not an ordinary event that a stranger, on the first introduction, can purchase a large and productive estate on time, without a money payment. The weight of evidence is that the respondent arrived here without means, and did he expect to produce from the estate the amount of purchase money to meet the payments as they became due; if so, it would seem that Vincent sold the estate for what it would produce in six, twelve and eighteen months, and if it was not an extraordinary estate, in its productions, paying largely be-

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yond expenses, it does not appear how the respondent was to make his payments, which excited no solicitude on the part of Vincent. On the arrival of the respondent, the complainant was managing the estate, without interference from Vincent, and had been for a year and a half.

In view of the history of the whole transaction, and more especially when we take into consideration the relationship of the parties, can there be a doubt that the respondent had been informed, and knew, that the estate belonged to the complainant, and that Vincent was ready to convey it on request?

The respondent further answers that he believes the furniture was the property of Vincent, because the complainant never made any claim for it. Vincent testifies that he never owned the furniture, and there is not a doubt, from the evidence, that it was purchased by the complainant. If the respondent regarded the furniture as Vincent's, it is somewhat singular that he could have used it for more than six years, for it is in evidence that it was valuable, without being informed of the incorrectness of the opinion. It appears that for years the parties were not on good terms, and, therefore, for reasons of friendship, he could not have believed that Vincent left the furniture for his use for this long period. It must have appeared to the respondent as exhibiting the same spirit of generous accommodation as the original transaction of the sale of the estate to him.

In examining the deed, as detailed in the bill, it appears that the habendum is in these words: "To have and to hold the above described property unto the said Daniel Montgomery, his heirs and assigns, forever, in like manner as I myself now hold the same, and subject to all mortgages, liens and encumbrances now existing on said estate, whether the same may have been created by myself or by any other person." If the respondent regarded Vincent as the owner, and his business in obtaining this conveyance was with him, and him alone, why did he not ask him to give him a short list of the mortgages, liens and other encumbrances on the estate. There was no conversation about the title or the encumbrances he had imposed upon it, and yet he gives his notes and mortgages for \$15,000 for a quit-claim deed, with the addition of this unusual

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provision, that he was to hold it in like manner as Vincent held it.

It appears he enters upon the management of the estate, and finds thereon a quantity of goods for trade, which he devotes to the use of the business, for some of which the complainant paid for after the respondent arrived ; and it is also proved that he purchased goods and lumber afterwards, which he paid for, and which were used for the benefit of the business on the estate. He conducted the business so far as using the property on the estate, the same as if all the property, personal and real, was his own, or as if he was managing the business for the owner, while it does not appear from his answer that he had any title to any of the personal property, excepting what he acquired by virtue of an auction sale of some cattle, amounting to \$145. It appears from the answer that the complainant directed the sale, and that he purchased them for that sum. If he was acting as trustee, the purchase would, of course, be for the benefit of the principal.

It appears, further, that some months ago the respondent called upon Vincent, for the conveyance of the schooner which Vincent purchased for the benefit of the estate, and he says he conveyed it, supposing it was the same thing whether he conveyed it to the respondent or complainant ; that he was paid for the advances he had made on the schooner, when he had the management of the estate, by complainant. This is another piece of property belonging to the complainant, which for years had been devoted to the use of the estate, in the same manner as if it had been conducted for the benefit of complainant, and for which it is not pretended by the respondent that he had ever purchased ; so that, in a word, the case presents itself in this way : Vincent holds in trust, for complainant, the estate at Puuloa, and which complainant had personally conducted for some year and a half, and he was desirous of re-conveying the same, that he might be relieved from the responsibility of the trust. The complainant communicates with his brother, the respondent, in England, desiring him to come to this country, and pays his passage here, and his expenses after his arrival ; takes him into the confidential relationship which his kindred blood naturally inspired, and desirous of keeping

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the estate in the same legal condition as before, and to enable his brother to have what he regarded as a profitable business, called on his trustee, Mr. Vincent, introducing his brother, and requests him to convey the Puuloa estate to him. He makes the conveyance, as has been already detailed, without any negotiation on the part of the respondent, takes the notes for \$15,000, and mortgage, and he says he delivered them to complainant. Soon after, the complainant became involved, and was confined in prison from October of the same year, for the period of twelve months. It is reasonable to suppose that from the declarations of the respondent, as well as from the relationship of the parties, and the circumstances which subsequently developed themselves, that those notes and mortgage were among the papers of the complainant which were passed into the hands of the respondent. He then enters on the estate, and not only the real, but all the personal property, he reduces to possession, and I have no doubt rightfully, and in accordance with the understanding with his brother. He converts all the goods for the benefit of the business. He keeps no account of sales with his brother of the goods, the receipts being devoted to the business; all the stock on the estate is devoted to the same purpose. The vessel also, which is valued at \$2,000, is devoted to the use of the estate; the furniture is put in use, and no contract for the sale or purchase appears, and no credits given complainant or Vincent; and yet he says he supposed the furniture was Vincent's. If this is true, it is singular that he should use it for years without any call from Vincent for an account of it, and more especially as he had in the meantime recovered a heavy judgment against him. He makes advances to his brother, but of small amount in comparison to the sum due on the notes. There is no evidence of any effort to have these amounts applied on the notes by the respondent, nor demand of complainant for payment. The notes and mortgage are not assigned by Vincent, and the mortgage is not recorded, and they are regarded, as far as the acts of the parties are concerned, as a nullity, as a mere matter of form. The complainant has certainly treated them so, not securing them by assignment or by record, or enforcing payment as an assignee in equity. The respondent, in his conduct, has regarded those obligations with the same indifference. Regarding, as I do, that the con-

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veyance by Vincent to respondent was intended by the parties to this suit, to place respondent in the same relationship of trust as Vincent stood to complainant, or as his deed expresses—"To have and to hold the estate in like manner as I myself now hold the same."

The whole conduct of the respondent in reducing all the property to possession, necessary to carry on the estate, is perfectly in accordance with the spirit of the trust and the relationship of the parties. It can be explained upon no other hypothesis than that the trust to Vincent was continued in respondent. In the case of the Methodist Episcopal Church vs. Jacques, 1 Johns. Ch. Rep., 450, the Court declared that lands purchased held by the husband, with moneys of the wife, are deemed to be in trust for her, though purchased in his own name, and a third person, to whom the husband had conveyed an estate so purchased, with notice of the manner of acquiring it, was held to be chargeable with the trust. This was a case where there had been a marriage settlement. So in the case of Murray *et al.*, Ballou *et al.*, 1 Id., 566, the Court say: That if a purchaser has notice of a trust at the time of purchase, he himself becomes trustee, notwithstanding the consideration he has paid. If the *cestui que trust* resumes the estate, and, as in this case, directs to whom the conveyance shall be made, and if made without consideration, as it is contended it was made in this case, a resulting trust arises. Furthermore, if there was a sale, and notes and mortgage taken in full consideration, how is it that the respondent could testify as he did in the Police Court, that he did not think that his brother had any interest in an inch of land, or any interest in any outstanding notes, when by his own showing, although his books are very unsatisfactory, his payments to his brother were—

From June 20, 1855, to June 14, 1856, - . . .	\$ 836 00
Less property sold, -	547 38
	<hr/>
	\$ 288 62
From June 14, 1856, to July 18, 1857, - . . .	1,367 00
From July 18, 1857, to July 17, 1858, . . .	226 00
From July 17, 1858, to August 1, 1859, . . .	534 00
From August 1, 1859, to close of the books, . . .	826 80
From 31st January, 1861, to Sept. 10, 1861, . . .	1,014 55
	<hr/>
	\$4,256 17

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So that according to this account, rendered by the respondent, he had paid the complainant during the last seven years \$4,256 17. If the notes and mortgage were given, and the estate was not held in trust, the amount due on the notes for interest would be more than he has paid by over \$8,000, which, added to \$15,000, the principal, makes about \$23,000 due ; besides the amount due for all the personal property converted to his use. If the complainant could have made oath to the truth of the statement, why should he not have done so, and foreclosed on the estate. And another equally pertinent inquiry is, in view of this state of facts, as deduced from his books, and his own statement that the notes and mortgage were in the possession of complainant in 1861, how can he reconcile it with his testimony in the Police Court, that he did not think that his brother had any interest in any land, or outstanding notes ? If he did not hold in trust why did he not seek to have endorsements made on the notes as he made payments ?

It is contended further on the part of the respondent that the allegation in the bill that the sum of \$8,000, acknowledged to have been received in the deed of the estates from complainant to Vincent is expressly denied by Vincent, and that the evidence does not sustain the charge. It appears that in 1848, when the complainant held the estate under lease, that he borrowed \$5,000 on an assignment of the lease and the salt on the estate, and that in 1849 complainant made the purchase and increased the debt of Mr. Vincent to \$8,000, which he took, as the understanding was to secure that amount. It is very true that it was not paid in payment of the purchase of the estate ; but it was received, and for which an incumbrance on the estate was created. It is a partial mode of stating the case ; at the same time I do not regard it a false statement in intent. The counsel further contends that the averment in the bill that two-thirds of the profits of the business of the estate were to enure to complainant, and one-third to Vincent, conflict with the evidence, which is, that one-third was to go to his wife. The legal right was in complainant, and not in his wife, and Vincent might have understood from complainant that he desired a third of the profits paid to her, still it does not appear that she had any legal claim ; for he swears that the estate was held in trust for

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complainant, and not for complainant and his wife, and the advances were not made in accordance with this view. It cannot be regarded as a material conflict in the evidence.

Vincent testifies that the money, amounting to \$5,000, raised on mortgage from Angel was equally divided between himself and complainant ; and that he gave at request of complainant a note to respondent for the amount which he received and the interest. This statement the respondent denies, and says the note was given for some other consideration, but produces no proof of it. There were other matters of business between complainant and Vincent, but evidence of various books prove the mode in which other indebtedness was paid. The weight of evidence is decidedly in favor of Vincent's statement ; certain it is that the consideration arose from indebtedness to complainant and not to respondent ; the respondent having recovered judgment on the same in 1856, which remains unsatisfied to this day.

It is contended further that it is not probable that if a proposition of settlement had come from complainant, that respondent's counsel would have advised him not to accede to it.

The respondent avers in his answer a denial of the allegation in the bill that complainant has made any efforts to obtain a settlement with the respondent in relation to the Puuloa estate or the business connected therewith, or alleged or pretended any right to a settlement in relation thereto. Mr. John Montgomery testifies in relation to a compromise between the parties, and that the respondent on the morning after informed him that he had agreed to his brother's demand to pay him \$10,500 to resign his claims to Puuloa, to be in installments in seven years, with interest. These terms of settlement were defeated in consequence of the complainant desiring to have a certain piece of land of the estate, but which the respondent objected to, on account of its being occupied by natives who were troublesome to him.

It further appears that the complainant, by his counsel, addressed a letter to respondent, proposing an arbitration, to which his counsel replied, asking to be apprised of the nature of the claim ; to which the counsel of complainant replied, setting forth the basis of his claim, and expressing a willingness

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to settle amicably and on liberal terms ; to which the respondent replied, and proposed a settlement by paying \$10,500, payable in seven years, secured on the estate, and on condition that complainant should leave the estate. This proposition was declined. It is incomprehensible to me how such an answer could have been filed, when the respondent negotiated with the complainant in person, and when his counsel for him replied to the letter of the complainant, proposing an arbitration, or some other mode of settlement, on amicable and liberal terms.

It is contended further, that the agreement, as alleged in the bill, was unreasonable, inasmuch as that if the estate turned out unprofitable, the respondent had made a slave of himself, as by its terms as set forth, he had bound himself to pay \$100 per month forever, receiving one-third of the profits. I do not regard that the trust is fixed in time. The condition itself is not uncommon. Men are constantly making contracts to pay a certain sum per annum for the use of property, taking the risk of the income. But there certainly can be no pretense for continuing the trust against the wishes of the trustee. There was no time specified of its continuance, and it was perfectly competent for him to surrender the trust at any time he pleased; but as long as it did continue, the bill alleges certain payments should be made to the complainant monthly, from his portion of the profits, and that the trustee should have for the management of the estate one-third of the profits, as Mr. Vincent had. I am not satisfied that this was the understanding, from the history of the management of the estate by respondent, and there is no sufficient proof of this allegation in the bill, unsustained by the circumstances. When this relationship in business began, it undoubtedly was with the true feelings of brothers. While the complainant surrendered to respondent the use and benefit of everything on the estate, such as the goods, lumber, furniture, stock, etc., etc., without exacting any account, and while the respondent used all this property for the common object, without giving any credit or proposing to render any account, at the same time the respondent was making what he regarded as improvements, and which were doubtless expensive, and so far as appears, without objection from the

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cestui que trust, who was living on the estate most of the time. It is much to be regretted that the terms upon which this business was to be carried on were not clearly defined. It began in the generous feelings of brotherhood, and was carried on without regard to accountability and has terminated in a disagreement.

It should be a warning to all in business relations. The terms and conditions should be clearly understood and defined.

The answer of the respondent is not only materially shaken by the evidence and the circumstances as developed in the course of the investigation, but his oath loses its force and confidence by his application to Vincent to testify in conformity to certain instructions, as detailed in Vincent's testimony, for the consideration of \$1,000. The testimony of Messrs. Montgomery and Davis to his own declarations that he had advanced money to Vincent, which Mr. Vincent positively denies, tends to increase the want of confidence in his statements.

I have examined this somewhat complicated case with great care, and upon the best examination I am able to give the law and evidence, my judgment is that the complainant is entitled to a decree declaring him in equity entitled to a conveyance of the Puuloa estate from the respondent, and that an account should be taken of his administration of the estate on the basis of a salary, for services per annum, charging him for the receipts of money for personal use ; for it is certainly very clear that the complainant has been conversant with the general management of the estate, of the buildings erected, and of the improvements made, and there is no evidence that he has made any objection ; therefore, upon principles of law and equity he is bound by all that has been done by his trustee, with the sole condition that the trust has in all these particulars been faithfully executed.

At present there must be an interlocutory decree, that reference be made to the Clerk of the Court, *ex officio* Master in Chancery, to state an account of all the moneys received from the trust estate by the respondent, and also all moneys expended thereon by him from June 19th, 1855, to the day of filing of this bill, and particularly an account of all moneys received by the respondent for his personal use, giving him credit for his

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services for the period aforesaid, with the usual powers given to the Master on such occasions, to examine either party and to require the production of all books and all documents and vouchers in the possession of either party, touching the subject matter of the trust estate.

C. C. Harris, for complainant.

A. B. Bates, for defendant.

SUPREME COURT—IN EQUITY.

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THE ancestor agreed to pay a certain stipulated sum for one-half of the estate, and take upon himself its sole management for the term of five years, without remuneration, one-half of the net annual proceeds of the estate to be applied in payment of the purchase money and interest, but died after the original term had expired, without having been able to liquidate the agreed price for his moiety : Held, that it was an entire contract, and must be fulfilled before any advantage could be claimed under it by the heir, and consequently that no proportionate part of the estate could be conveyed to the heir, as for a fulfillment *pro tanto*, arising from labor performed by the ancestor or partial payments made.

The opportunity of paying the amount due on the original contract was afforded the complainant, in order that she might avail herself of the benefit to be derived from it.

There are rights of moral or imperfect obligation appealing to the sense of justice of the party, but which, under certain circumstances, can not be enforced at law or equity.

ALLEN, C. J.

This is a bill in equity, in which the complainant, the widow of Samuel Burbank, and as guardian *ad litem* of his children, minors, alleges that Samuel Burbank entered into an agreement with the respondent, dated May 15, 1851, for the purchase of one-half of the Koloa Plantation, with all the personal property on the estate required in the cultivation of cane or the manufacture of sugar, for the sum of twenty-five thousand dollars,

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with interest after one year, and in which he stipulated to take the sole management of the property for the term of five years, for the mutual benefit of the parties, but without charge, and that one-half of the net annual proceeds should be applied, until the amount due for principal and interest of the said purchase is paid. It appears further, by the contract, that the respondent agreed to furnish the money and goods which might be necessary to carry on the estate, charging the usual interest, and to make sale of all products of the plantation, and to do all other business requisite for the same, so far as he was able, at Honolulu, without commissions.

It was further mutually agreed that neither party should sell his interest unless with the consent of the other, for the term of five years.

It is further alleged, that in pursuance of this agreement, the said Burbank entered into the possession of the plantation and labored faithfully for the term of five years, but that during this time it was thought advisable by the parties to devote a large amount of time, capital and labor to the drainage of marsh land, and to certain permanent improvements and additions, which could not be remunerative within the term of the contract, but were thought advisable, as the plantation without them and carried on as before, would prove unproductive. It is further charged, that on the settlement of their accounts, it was agreed that the price of the plantation should be \$40,000 instead of the sum originally stipulated, and that in consequence of the failure of the crops and the considerations before set forth, it was agreed that interest neither on the principal nor advances should be paid. It is further charged, that said Burbank paid during his life \$3,228 50 ; that the original contract expired May 15th, 1856, but that he continued to superintend the estate till the day of his death, which was on the 10th of May, 1857. It is further charged that a tract of land called Paa was purchased for \$2,000 during the term of the contract. And it is further charged, that by mutual agreement, made and entered into by the parties, during the period of Burbank's occupancy of the premises, he was to have a deed of one-half of the plantation, after the coming in of the crop growing at the time of his decease.

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And the complainant further alleges, that after the death of her husband the respondent often consulted her in relation to the sale of the estate, advising against it, saying that it would be a good property for her children, and treating her in all respects as a co-partner, saying that she and her children had as much right in the estate as any one ; that she and her children should have a portion of it ; that she had no reason to be disturbed about the future, as she had ample means of support.

The complainant further says that she resided on the estate with her children till October, 1860, as she had good right to do, and that during this period she received from the plantation \$1,826 62, or thereabouts ; and the complainant further avers that she is informed, and believes, that the respondent has more than once admitted, since the death of her husband, that his heirs were justly entitled to a portion of the plantation, at one time one-third, and at another time one-fourth. The complainant further avers that she has made efforts for a settlement, without success, and that the respondent refuses to do aught in the premises.

The prayer of the complainant is, that the respondent may be decreed to deed to the heirs of said Burbank such proportion of the estate as they were entitled to on the 10th of May, 1857, and to account for the proceeds of the plantation from that date, and also to render an account from May 15th, 1851, to May 10, 1857 ; and that the complainant may have a just equivalent for the labor performed by said Burbank, and for the money advanced by him.

The respondent admits the contract, and that in pursuance thereof Burbank took up his residence and labored on the plantation for five years, but denies that the expenditure of draining the marsh land was at his instance, but that of the said Burbank, although it had been a subject of conversation between them. He further answers and says, that although the said Burbank usually consulted the respondent upon all matters of improvement of the plantation and outlays of money beyond the current expenses, still he was allowed paramount control, agreeably to the agreement or contract aforesaid.

The respondent denies that at the time the said Burbank assumed control as resident manager, that the draining was under-

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taken because the plantation was likely to prove unproductive, but avers that the crop under cultivation at the time was the largest and most profitable of any during his management. The said Burbank, however, was always confident of profitable results from the swamp land, and believed this would enable him to pay the amount due by him on his contract for the purchase—that he planted on said marsh about eighty acres of cane before it was fully drained, and that although the respondent expressed his doubts about the result, the said Burbank continued sanguine of large returns till within about three months of his decease, when a considerable portion of the cane growing thereon was blighted. The respondent further says that it was not understood or agreed that the plantation should be valued on settlement at \$40,000 instead of \$50,000, but that he did say to him, that perhaps at the time of making the contract, the plantation was valued too high, and suggested a willingness to reduce it to \$40,000; but that said Burbank replied “he would have no more gratuities, he preferred to work it out and see the result;” and that the subject was never reverted to again. Said respondent denies that he ever intimated to said Burbank, or any other person, during his lifetime, that it was his purpose not to charge interest on the advances or on the contract, and avers that he has no recollection of ever having had any conversation on the subject, but avers that if there is in existence any written memorandum from which it can be inferred that it was ever the purpose of this defendant to give to the heirs of the said Burbank the advantage of the proportion made by this defendant to the said Burbank, to reduce the estimated value of the plantation to \$40,000, which the said Burbank refused to accept during his lifetime, and to forego and relinquish the claim to interest on the advances made by him, and on the stipulated price agreed upon by the parties to the said agreement, it is only a copy surreptitiously obtained, of a private memorandum made by this defendant soon after the decease of the said Burbank, to guide his solicitor in preparing the will of this defendant, and which was not intended to be a memorandum of an acknowledgment of any legal or equitable obligation on the part of this defendant to change in any manner the terms or cancel the said outstanding contract.

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The respondent further answers, that the charge of \$3,228 50, paid by the said Burbank for the benefit of the estate, he had regarded as settled by the charge of the current expenses of his family for the term of five years and three months, during the time the said Burbank had charge of the plantation, but if that credit is given as now claimed, he insists that the current personal expenses of herself and family should be charged.

The respondent further answers and says, that at the time the contract was made the plantation was a leasehold, and both parties regarded it for their interest to obtain the title in fee simple, which they did for a portion of the plantation, for the payment of \$3,004, and he asserts that this was done by mutual accord, and that it was for the benefit of all parties. The respondent denies that said Burbank was to have a deed of half of the plantation after the coming in of the crop growing at the time of the decease of the said Burbank, and that at no time within the recollection of the respondent did said Burbank ever intimate a wish to change the original contract.

And this defendant further answering, denies positively that he ever consulted the said Mary A. Burbank in reference to the sale of the Koloa Plantation, or in reference to his business connection with the plantation, but on the contrary, avers that previous to this defendant's visit to the United States, in the years 1859 and 1860, the said Mary A. Burbank never, by word or deed, awakened in the mind of this defendant a suspicion that she believed that she or her children had any valuable claim to or interest in the Koloa plantation, but on the contrary impressed this defendant with the belief that she was suffering under a painful sense of destitution and dependence upon this defendant, from which this defendant did endeavor to relieve her by the declaration that she had no occasion for solicitude in regard to her support, but that he never (even during the time that he regarded her as worthy of careful consideration, from her depressed state of mind) so far avoided the truth as to say that she had ample means for her support in her own right, or words to that effect.

The respondent further says, that he positively denies that he ever used the expression attributed to him, intending thereby to admit that the said Mary A. Burbank, or her children,

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were either equitably or justly entitled to any portion or part of the plantation, but on the contrary avers the truth to be, that although it was the purpose of this defendant to make the said Mary A. Burbank believe she was welcome to a home in his family, and that her children should be properly cared for, and that she had no occasion to be disturbed about the future, he studiously avoided communicating her circumstances to her, for the reasons above stated, and that she might not feel embarrassed in accepting and receiving the hospitalities extended to her and her children.

And this defendant, further answering, positively denies that he has on more than one occasion, subsequent to the decease of the said Burbank, or in a single instance admitted that the heirs of the said Burbank were legally or equitably entitled to a portion of the Koloa plantation, at one time one-third and at another one-quarter, but admits that it has been his purpose to protect the family of his late brother-in-law, Samuel Burbank, deceased, against the contingency of their being thrown upon public charity in a foreign country, in the event of this defendant's decease, and this defendant has been informed and believes, that a memorandum prepared by him to guide the solicitor of this defendant in preparing his last will and testament, has been surreptitiously seen, and a copy of the same obtained by the said Mary A. Burbank, and that he has good reason to believe that it was from that source alone that she obtained all the information that she possesses in relation to this defendant having admitted, in any form or shape, that the heirs of the said Samuel Burbank were entitled to receive, as an act of justice, any portion or interest in the Koloa plantation. He further says, that in a conversation with a personal friend of said Burbank, soon after his decease, he did say that he hoped the enterprise would not turn out an entire failure, and that although at the time he did not know how the estate would turn out, he hoped they would have something left, perhaps one-quarter, although he did not intend this as an acknowledgment of any legal or equitable interest.

The respondent further answers and says that the original contract is now outstanding, uncanceled and operative, and that there was due him from said Burbank at the time of his

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decease, on the purchase and for his portion of the advances, the sum of \$47,611 44.

And this defendant, further answering, avers that he has been informed and believes that the estate of the said Burbank is largely insolvent, and that the administrator, or the heirs of the said Burbank, are entirely without the ability to pay this defendant the amount due to him, as above stated, and that the one-half of the Koloa plantation, at the time of the decease of the said Burbank, was not worth, and could not have been sold for the amount due this defendant, and that therefore, being in possession of the same, he has retained it, and managed and controlled it for his own benefit and profit, as he had a good right to do, and that he is not required to account for the management and products of the plantation since that period, but that he is ready and willing to do so if the complainants in this suit are ready and willing to allow this defendant interest on the amount justly due, on the decease of the said Burbank, from his estate, and are ready and willing to cancel and pay the balance that may be found due to this defendant for the price of one-half of the Koloa plantation and advances made on that account, and also to convey the one-half of the estate as it now stands, upon the receipt of such balance, after the same is adjusted, to the heirs of the said Burbank and their heirs and assigns, in accordance with the terms of the original contract. And the respondent further says that if the complainant declines to fulfill the contract as tendered in his answer, the same should be cancelled, and therefore the defendant humbly prays that unless the amount justly due on said contract is paid to him by the heirs of the said Burbank, that a decree may be entered, ordering the said heirs, by their guardian *ad litem*, to cancel said contract.

By the principles of law and equity, contracts must be fulfilled before the benefit resulting therefrom can be enjoyed. If the ancestor failed to fulfill his obligations, his heirs cannot reasonably expect the advantage of it until they fulfill it. It is not pretended that the contract is fulfilled, but it is contended in the first place, that the plantation was improved and enlarged during the time that the ancestor had the charge of it, and that it derived advantages from his labor; that therefore it was a

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fulfillment *pro tanto*, and that a proportionate part of the estate should be conveyed to the heirs.

The authorities do not support this position. Neither law nor equity make a subdivision of a contract of this character. It is one and entire. It is a fulfillment or non-fulfillment. If, for example, a contract is made for the purchase of a house for a certain sum, to be paid at several stated periods, and there should be a failure in the payment of a portion of the amount, it will not be contended that a Court of Equity can make a new contract, and order the conveyance of a portion of the property, according to the amount paid. Courts have power to enforce contracts, not to make them. The counsel contends that the ancestor had an interest in the plantation, and that it was in the nature of a mortgage. It is true he had an interest—what may be termed an inchoate interest—an interest begun but not perfected; and it is so far analogous to a mortgage, that in order to compel the respondent to convey one-half of the estate, as expressed in the contract, the entire conditions must be complied with. A part payment of a debt, secured by mortgage, does not prevent a foreclosure of the entire estate. It must be a payment of the whole amount due.

Justice Story, in his Treatise on Contracts, says: "An entire contract is a contract the consideration of which is entire on both sides. The entire fulfillment of the promise by either, is a condition precedent to the fulfillment of any part of the promise by the other. Whenever, therefore, there is a contract to pay a gross sum, for a certain and definite consideration, the contract is entire, and is not apportionable either at law or equity. The principle upon which this rule is founded, seems to be that as the contract is founded upon a consideration dependent upon the entire performance thereof, if from any cause it be not wholly performed, the *casus fœderis* does not arise, and the law will not make provision for exigencies against which the parties have neglected to fortify themselves. In such cases it is wholly immaterial whether the exact and complete performance of the whole contract be rendered impossible by overwhelming necessity, or be occasioned by the negligence of the party. If the contract be not completely executed, no action for the consideration can be maintained. Nor is this doctrine

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confined to the common law, for Courts of Equity have universally adopted the same rule, except in some few cases in which there were peculiarly equitable circumstances, and which were founded in fraud, or surprise, or mistake.

“Again, where the condition is precedent, it must be strictly performed in every particular, in order to entitle the party whose duty it is to perform it to enforce the contract against the other party.”

There can be no doubt of the intention of the parties, viz : A sale and purchase of one-half of the plantation, with certain personal property. There was no intention of a sale and purchase of any other portion in any event. Had it been so, there would have been this stipulation : That if the one-half was not paid for, the respondent should convey such a proportion as was paid for. This is making new terms and conditions, which neither party contemplated; and although in cases of this character, the party who has paid a portion may have incurred a loss, the party to whom the full amount of the purchase money was due may have suffered more from a non-fulfillment. Contracts must be enforced according to the clear intent and meaning of the parties, and in this case there can be no question, for the terms are clear and explicit. It is not a contract which can be apportioned. “When parties enter into a contract, by which the amount to be performed by the one, and the consideration to be paid by the other, are made certain and fixed, such a contract cannot be apportioned ; for in such cases no part of the consideration can be recovered in an action on the contract, until the whole for which the consideration was to be paid is performed.” (2 Parson’s on Contracts, 32, 35.)

It is contended that the contract was oppressive, from the fact that the labor of the party on the plantation was in offset to the furnishing money and supplies necessary to carry on the estate, and the value of the services of making the purchases for the plantation and sales of its products ; but this is not apparent on its face, and no evidence has been adduced to prove that the value of the services were so unequal as to justify the interference of the Court. It appears that the contract was made openly and fairly, and with the entire understanding of both parties. Whether it was a wise and judicious contract, is

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not for the Court to say ; but it is not pretended that it was tinctured with fraud. It doubtless appeared, at the time, that there were advantages in the contract, especially for one without means, for if the result had been as the anticipations were at the time it was made, the contract would have been profitable, and a handsome and independent estate would have been acquired for the five years services.

Courts have powers to enforce contracts, not to make them. These principles, as recognized by Courts of Equity, are clear and undeniable, and commend themselves to the judgment of men. If advantages have accrued to one party by the labor and exertions of the other, and there is inability on the part of the heirs to fulfill the contract, it is a matter in *foro conscientiae*. In all this class of cases, the party may well reflect upon the Roman proverb—*Res vertitur in meo foro*—"The matter is pending in my own Court." It is claimed that there was a modification of the contract that the price of the estate should be reduced from \$50,000 to \$40,000, and without interest ; but this is denied ; and there is no evidence bearing on this question save and excepting in the answer and in the private memorandum referred to therein—the first of which says that the respondent offered this reduction of the amount of the principal, but which was repudiated by the ancestor himself, for by the answer it appears that the respondent did express a willingness to the ancestor to reduce the price of the estate from \$50,000 to \$40,000, and that he replied—"No ; I will have no more gratuities ; I will work it out ; we will see how it will come out." And the respondent says the subject was never referred to again. Still, by the private memorandum referred to, made subsequent to the death of the ancestor, the respondent says, "that in consideration of disappointment of crops, I passed my word to Mr. Burbank that the valuation of the plantation at the time of the purchase should be taken at \$40,000, instead of \$50,000, of which promise this is the only record." This conveys the idea that the respondent intended to put on record the promise made to Mr. Burbank, so that, in any event, a settlement should be made on that basis, so that if the heirs complied with the terms of the contract, they should have the benefit of this mod-

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ification ; but there is no evidence of any promise to remit the interest or reduce its rate on the principal.

It is further contended that, by the same private memorandum, found with respondent's papers, there is an acknowledgment of a quarter interest of the estate belonging to the heirs, which the Court should regard as obligatory on him, and that the benefit should accrue to them. The counsel contends that the paper found in the respondent's secretary admits a consideration and an equity. The respondent says it was a memorandum drawn by him to guide his solicitor in drafting his will, and for the reason that he thought it proper that it should appear in the will why he made such a disposition of his property to those not connected with him by ties of consanguinity ; but it is contended that it could not have been made with this intention, for its language admits of no such interpretation. But the answer gives this interpretation ; and even if it did not, the question would arise whether it would be enforced in a Court of Law and Equity. It is not a promise to the parties to make a conveyance of a fourth part of the plantation, or the record of a promise, as in the case of reduction of the price ; and while it was at the time an expression of his own sense of justice, yet it was a matter purely within his own discretion—a mere acknowledgment of benefits derived from a partial fulfillment of a contract, but it creates no legal liability. As before stated, to give a party the benefit of his contract, he must fulfill on his part. It is not contended that the ancestor did comply with the contract, neither have his heirs, so that unless it has been so waived, and such new conditions recognized as to afford grounds for enforcing it in part, the right of the parties must rest on the original agreement. Contracts partially fulfilled by one party may be productive of advantage to the other, and yet cannot be enforced at law or equity, for the principles which govern both tribunals demand the entire fulfillment of the contract before it can be enforced. In this case, as I understand the answer, the respondent is willing to regard the contract as still subsisting, and that the account may be made up of the amount due upon it, deducting the net proceeds of the plantation, and on payment of the amount due him, he will convey the half interest to the heirs. Legally, the contract terminated at

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the death of the ancestor, unless continued by agreement or the acts of the parties. It is not necessary now to inquire whether the contract did subsist under the circumstances of the case, till the complainant filed this bill, which I am inclined to think would be the legal operation ; still, as this is acquiesced in, it is unnecessary to discuss it. But it is contended that as the respondent has acknowledged that the heirs would be entitled to one-quarter by the private memorandum before referred to, would it be obligatory on the party in law or equity ? The partial fulfillment of a contract may be of advantage to a party, and so acknowledged by him to be, but it does not lay the foundation of a suit either in law or equity. In all such cases it is a matter in *foro conscientæ* of the party himself. But in this case, the respondent says that it was a memorandum made for his solicitor to guide him in making his will ; if so, it was an acknowledgment that he thought it equitable to devise such a portion of the estate to the heirs of the party, but it would not certainly lay the foundation for a suit, although it would be an acknowledgment that he thought it equitable that he should devise to the heirs a quarter of the estate, to be enjoyed after his death. If the respondent was not under obligation, either by the principles of law or equity, to make this conveyance of quarter of the estate to the heirs at that time, it amounted merely to this : That he would make a present to the heirs, induced to do so by the advantages derived from their ancestor, in his management of the estate. Courts of equity are governed by principles of law ; and there are many cases where they cannot give relief, which would have merits in *foro conscientæ*, whether this is within that class, it is not within the province of the Court to decide. It can only be submitted to the conscience of the respondent. There are rights of moral obligation which the laws do not enforce, and are left to the sense of justice of the party, and they are deemed rights of imperfect obligation. In this point of view, it is a matter which must be left to the conscience of the individual to pass judgment upon the advantages resulting from the management of the estate by the ancestor. A party may acknowledge that he has derived advantages from the partial fulfillment of a contract, but he does not thereby incur a legal obligation to pay for those ad-

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vantages, or to so far modify the contract as to give the party the benefit of a partial fulfillment and waive a portion of his rights. It may be generous to do so, and in some cases it may be just ; but it is a matter appealing to the sense of justice of the party and not to the principles which govern Courts of law and equity.

Want of success in an enterprise works injury to all parties. In the first place, it has been so to the respondent, for he not only has not received the amount due him on the contract, but he has not derived any material benefit from the annual income of the property, as it has been principally expended in carrying on the estate. Money was expended, to some extent by mutual accord, for improvements and for additions to the estate. It is unfortunate for the heirs also, as the receipts were not equal to the anticipations of the parties, and the debt contracted was not paid as expected. But whose fault was it? It may be regarded as the fault of neither, but the misfortune of both. The money expended on the swamp lands was a decided loss. The other expenditures, made for permanent improvements, and for the purpose of additional land for cane, was an advantage. It was optional for the ancestor to acquiesce in the purchase of lands. He was under no obligations to embark in new experiments or improvements not necessary to carry out the regular business of the plantation, but having done so, it was necessarily so much draft on the ordinary income of the plantation, and it limited his means to make payments on his contract. They were no doubt considered excellent investments at the time, but the results show, that in the swamp land especially, that the parties misjudged as to the profit to be derived.

It is further contended, that the parties to the contract were partners, and that the survivor had failed to administer on the estate, and being thereby in his own wrong, had incurred certain liabilities to the heirs. That they were partners in the business appertaining to the plantation is true, and the respondent was liable for all the debts against the partnership, whether there was an administration or not. If the debts of the partnership are paid, there is no wrong or injury. The principle to which the counsel refers is where there is an interference with the property without legal authority. Partners

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are liable in any event. But in this case there is no reason for the heirs to complain, but, on the contrary, the respondent has carried on the estate in a manner not complained of, and the Court now give them, agreeably to the terms of the answer, the opportunity of paying the amount due on the original contract, having all the advantages of profits which may have arisen from the business of the estate. Either party could have petitioned the Court for aid to settle the matters between them at an earlier day, but as they have not, the Court regard it as just that the accounts should be made as agreeably to this principle. There is justice in this view of the case, because the ancestor continued to manage the estate subsequently to the expiration of the contract, and until the time of his death; and further, the widow continued to reside upon it for some years after, with the expectation perhaps that the income of the property would so far liquidate the liabilities that the respondent would convey to the heirs an interest in the plantation. As the complainant or the heirs could not be expected to know the state of the accounts until perhaps there was an adjudication in a Court of Chancery, it is right, even now, although at a late period, that they should have the right, after an account stated, to comply with the contract, and take a conveyance accordingly.

It is contended further, that it is not equitable that the heirs should be required, in the first place, to pay the balance of what is due on the contract, because they ought to have the benefit of the accruing interest, and because they were not in the wrong. It is very true that they were not in the wrong for the non-fulfillment of the contract. It must be regarded as a misfortune; nevertheless it is true that the contract has not been fulfilled, unless the amount due on either the original or modified contract has been paid. There are many contracts which are not fulfilled, and which arise from the misfortune of the party; but it is a new doctrine that on that account he is entitled in a Court of Law and Equity to a compliance of the contract in whole or in part by the other party. This would open a wide field of legal discretion, and give to Courts a greater control over the rights of parties than any authorities authorize. Courts must give construction to contracts, and not adjudge whether parties were wise in making

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them, or whether they have been judicious or unfortunate in fulfilling them. As to the accruing interest, under the view which the Court take of the case, and which is in accordance with that of the respondent, as expressed in the answer, the heirs will have all the advantages of any profit which may have arisen from the estate, they paying any balance which may be due on the contract after deducting the net proceeds of the plantation. The counsel has, as I think, in some degree misapprehended the equities of this case, and it may be worth while briefly to review the transaction. The respondent was the owner of a plantation, regarded at the time as profitable and of great value, and he makes a contract of sale with the ancestor for half part. No payment is made, and none is required, for the term of five years, except from the net proceeds of the estate. At the time one was wealthy and the other had small means. The labor of the one on the plantation was offset to that of the other at the market where the supplies were obtained, and where the products were sold. All that the plantation required was supplied by the respondent, charging the usual rate of interest. He was never embarrassed for means. He had every facility, so that he might take the advantage of every improvement. Purchases of property were made, which were undoubtedly advantageous to the estate, and nothing was lost for the want of capital. Still the estate was not as profitable as was anticipated, not from the neglect, or by acts of the respondent, for that the ancestor had the principal control and direction, is apparent from the testimony. The sad calamity of the death of the husband of the complainant and father of the heirs, puts an end to his labors, and the estate reverts to the respondent's superintendence, who has conducted it ever since judiciously, so far as appears. And now the respondent expresses his willingness that the contract should be considered as subsisting, and that the heirs should have all the advantages accruing under it to the present time.

It is a misfortune that the ancestor did not live to have fulfilled the contract, and to have had the entire benefit of his labor, but now the heirs can have all the benefit arising from his labors, if they are able to fulfill the contract.

As the case is presented by the bill, answer and proofs, I am

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of opinion that, on the 10th day of May, 1857, the heirs of the ancestor were not entitled to a conveyance of any portion of the estate, because, from the accounts rendered, which are not contested, the contract, as modified, was not fulfilled, and therefore they are not entitled to an account of the proceeds from that date, as prayed for. And, therefore, the bill must be dismissed, unless to avoid expense, the complainant should move to amend the bill, praying for an account of the proceeds of the plantation to the time of filing the bill, or, perhaps, to the present time, in order that the amount on the contract may be ascertained, so that for whatever balance there may be, payment may be made, and the contract executed, whereupon a conveyance of one-half of the estate would be ordered.

Mr. Harris for complainant.

Mr. Bates for respondent.

September 18, 1862.

SUPREME COURT—IN EQUITY.

WM. A. ALDRICH EXECUTOR OF THE WILL OF R. W. HOLT, *vs.*
JAMES ROBINSON AND ROBERT LAWRENCE.

REAL ESTATE, purchased with partnership funds, and held and dealt with as partnership property, will, in equity, so far as may be necessary, be treated as personal property.

The share of a deceased partner in the proceeds of the real estate of the partnership, sold for the purpose of a distribution of assets, between the representatives of the deceased partner and the surviving partners, regarded as real estate in the hands of the executors, and to be dealt with as such under the provisions of the deceased partner's will.

Before Justice ROBERTSON, as Vice Chancellor :

Per Curiam.—The plaintiff has filed a bill in equity, as executor of the will of the late Robert W. Holt, setting forth, in substance, that the said Robert W. Holt, in his life time, was a copartner with the respondents in the firm of James Robinson & Co., of Honolulu ; that said Holt, Robinson and Lawrence

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were the owners, as tenants in common, of a large amount of real estate, purchased with the funds of the partnership, and held and used as partnership property ; that the said Holt died on the 6th day of July last, leaving a will, which has been duly admitted to probate, and by which will the plaintiff is appointed sole executor and trustee for the devisees ; and that as the real estate held in common by the said copartners cannot be satisfactorily or advantageously divided between the respondents, as surviving partners, and the plaintiff as executor aforesaid, it is desirable and necessary that the real estate should be sold and the proceeds thereof divided. And the plaintiff prays an order of sale accordingly, and that the respondents, together with himself, may be authorized and required to make such sale, and to execute all necessary conveyances.

The respondents have filed an answer, admitting the copartnership with them of the late Robert W. Holt ; that he was seized of one undivided third part of the real estate described in the bill, which was partnership property ; that the same can not be partitioned in a manner satisfactory to the parties interested ; and joining in the plaintiff's petition for an order of sale, that the proceeds may be divided.

The respondents admit the necessity of the sale, and join in the prayer for the order, but still it seems necessary to consider the question, whether or not the plaintiff, as executor, is the proper party to ask for the sanction of the Court, and to be authorized to join in executing the requisite conveyances.

The question as to how far real estate, purchased with partnership funds and held and used as partnership property, is upon that account to be regarded and treated as personal property, is a novel one in this country, and I have examined the subject with a good deal of care, for it is a question of considerable importance even under our law of inheritance, although not so much so as it is under that of England.

This is one of those subjects upon which a variety of judicial opinion has been enunciated at different times, both in the English and American Courts. So great has been the diversity of opinion that Mr. Justice Story, when he wrote his learned treatise on the Law of Partnership, said the subject must be considered "as open to many distressing doubts." (Story on Partnership, Sec. 93.)

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Mr. Bisset, a respectable English text writer, in stating his view of the doctrine to be deduced from the adjudged cases, gives the first proposition as follows :

“That in the absence of a specific agreement to the contrary, real estate purchased with partnership funds for partnership purposes, is converted out and out into personal estate, and therefore goes to the personal representative, and not to the heir of a deceased partner.”

With all due regard for so respectable an authority, I feel constrained to say, that in my opinion, the rule here laid down is not sustained by the weight of authority, either English or American ; and if such has been held to be the law in some Courts, it does not seem to me to be based upon satisfactory reasons.

The difficulty which surrounds this subject is attributable in a great measure, I think, to the efforts of the English Equity Courts to overcome the peculiarities of the English common law affecting real property, so as to subject real estate purchased with partnership funds, for partnership purposes, to partnership liabilities, in like manner with the personal estate of a partnership. In effecting this object, some judges have gone the extreme length of holding that in equity real estate so purchased and held, is not only to be regarded as personal property, for purposes connected with the partnership, but as being converted out and out into personality, and to be so regarded and dealt with for all purposes whatsoever.

Those who, with Mr. Bisset, regard the extreme doctrine as being clearly established, appear to me to attach too much weight to some decisions given by the learned Chancellor, Lord Eldon, and followed by several other judges. In the case of *Ripley vs. Waterworth*, 7 Vesey, jr., 425, his lordship held that real estate conveyed for the purposes of a partnership trade, was converted out and out into personal estate ; but it must be observed that in that case there was a written agreement between the parties, and the decision was based upon the construction of that agreement. In the case of *Townsend vs. Devaynes*, his lordship is reported to have decided that real estate purchased for partnership purposes, took the character of personal estate, so as to belong, at the death of a partner, to his

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personal representatives, but I am unable to ascertain whether or not there was any agreement in that case. Mr. Jacobs, in his edition of Roper's Husband and Wife, accounts for the decision on the supposition that there was an agreement; and Sir L. Shadwell, V. C., in *Randall vs. Randall*, said the case of *Townsend vs. Devaynes*, decided only that where partners in a trade purchase land for the purposes of the trade, it shall be considered as personal. In *Stuart vs. The Marquis of Bute*, 11 Vesey, jr., 665, Lord Eldon said, that in cases where persons engaged in partnership have bought freehold houses, the difficulty of distinguishing and arranging property of different natures, partly personal and partly real, has never been held sufficient to exclude the heir, except by the effect of the contract or the will of the deceased partner. In *Selkirk vs. Davies and Salt*, 2 Dow, 242, his lordship did declare his opinion to be, that all property involved in a partnership concern ought to be considered as personal; but when adverting to this same point in the later case of *Crawslay vs. Maule*, he evidently considered it as a question by no means settled, whether freehold estate purchased by a partnership, and in some sense an article of stock in trade, would, on the death of a partner, pass as real estate or as stock; as personal estate in enjoyment, though freehold in nature and quality. On the whole, therefore, I do not consider the opinion of Lord Eldon as having finally settled down in favor of the application of the principle to the extent that is claimed.

In the case of *Phillips vs. Phillips*, Myl. & K. 649, Sir John Leach, M. R., upon the authority of *Townsend vs. Devaynes*, and the opinion expressed at different times by Lord Eldon, and from considerations of general convenience, held that freehold and copyhold public houses, purchased by two brewers with the partnership capital, and conveyed and surrendered to them and their heirs for the purposes of the partnership trade were to be considered as personal estate generally, and not merely for the payment of the partnership debts. His Honor adhered to the same view in the later case of *Broom vs. Broom*, 3 Myl. & K. 443, and upon the authority of these cases, Mr. Baron Alderson held the same doctrine, in the case of *Morris vs. Kearsley*, 2 You. & Coll., 139.

I will now refer to some decisions of a different aspect. In

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the case of *Thompson vs. Dixon*, 3 Brown's C. C., 166, Lord Chancellor Thurlow held that, had the agreement been that the mills should be valued and sold, it would have converted them into personalty of the partnership; but that the agreement in this case was not sufficient to vary the nature of the property; therefore, that after the dissolution, the property would result according to its respective nature, the real as real, the personal as personal, estate. It is observable that the decision in this case, like that of Lord Eldon in *Ripley vs. Waterworth*, rests upon the construction of an agreement between the parties.

In the case of *Bell vs. Phyn*, 7 Vesey Ju., 453, in which judgment was given on the same day as in the case of *Ripley vs. Waterworth*, Sir William Grant, M. R., one of the ablest equity judges who ever sat upon the English bench, said, at the close of the argument, that, supposing this was partnership property, he doubted whether the consequence was a conversion, for there was no occasion to call for it for any of the purposes of the partnership. It remained clear. And his Honor suggested the pertinent question, "Why is it to be considered personal property, something different from what it really is, as between the real and personal representative?" a question to which I have not yet seen a satisfactory answer given by any Court holding a different opinion. He decided in favor of the heir, on the ground that, even if it was partnership property, there was nothing done by the partners to alter the nature of it.

In the case of *Balmain vs. Shore*, 9 Vesey Ju., 499, the same learned judge, citing the decision of Lord Thurlow, in *Thompson vs. Dixon*, held that real estate purchased and held for the use of the partnership, was not converted into personal property.

In the case of *Randall vs. Randall*, the Vice Chancellor, Sir L. Shadwell, held that the property which was the subject of the suit, was not, under all the circumstances of the case, to be considered as converted into personalty, because "it did not appear that the parties purchased the land for the purposes of their partnership in trade," and it was understood from the tenor of his judgment that he was disposed to hold, that, in the absence of any express agreement to the contrary, the real property of a partnership is not to be deemed converted into per-

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sonalty, except so far as may be necessary for partnership purposes. (Collyer on Part., Sec. 149 ; Bisset on Part, p. 31.)

In the subsequent case of *Cookson vs. Cookson*, 8 Sim., 529, Mr. Collyer says Sir L. Shadwell had an opportunity of deciding the express point ; but Mr. Bisset thinks the decision in that case does not conflict with the more modern decisions which preceded it, on the ground that the real estate was not actually purchased with partnership assets. In that case the real estate was originally the property of Isaac Cookson, the elder, who, when he took his son into partnership with him, gave him six thirty second parts of the real estate, and then it was agreed between them that the real estate should continue to be used as a manufactory for carrying on their trade, and should be had, taken, and enjoyed as a part of the joint stock in the partnership business. The Vice Chancellor, in giving judgment, did make a point of the fact that the real estate was not actually bought with partnership money, apparently for the purpose of freeing the case from the application of what he evidently considered the unreasonable doctrine of former decisions. But in answering the question whether or not the real property, in any case, is converted out and out into personalty, I see no difference in principle between the case of the parties putting into the stock real estate which they already hold in common, and that of purchasing real estate and then putting it into the stock. In respect to a clause at the end of the articles, which it was argued must be taken as showing that for all intents and purposes, and for all time, the father's shares had become personal property, his Honor said, " I understand the covenant as having a very distinct meaning, namely, that during the partnership, and, if necessary for partnership purposes, after the expiration of the partnership, the shares which the father and the son had respectively, should be considered as personal estate ; but it would be quite absurd to say that the covenant shall be so extended as that, though the partnership expired, and though the land was not required to be sold for partnership purposes, it should have the effect of making that which was unquestionably land in its own nature, absolutely personal estate, not for any beneficial purpose either to the father or to the son, but for the purpose of making a sort of unnatural and unnecessary conver-

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sion of real assets into personal, as between the real and personal representatives of the two partners respectively." (Bisset on Part., p. 31.) It seems to me that the legal, or rather equitable, implication by which it has been held in some cases, that real estate devoted to the use of a partnership, became converted out and out, and to every intent, into personalty, can never be deemed of greater force than the express covenant here referred to in *Cookson vs. Cookson*, and yet the learned Vice Chancellor gave to that covenant what I consider the only sound construction, limiting the operation of the equitable principle to its legitimate bounds.

In the case of *Hoxie vs. Carr et al.*, Sumner's R., p. 173, Mr. Justice Story, in the course of his decision, remarked, "A question often arises, whether real estate, purchased for a partnership, is to be deemed for all purposes personal estate, like other effects. That it is so, as to the payment of the partnership debts, and adjustment of partnership rights, and winding up the partnership concerns, is clear, at least in the view of a Court of Equity. But whether it becomes personal estate as between the executor or administrator of a deceased partner and his heir or devisee, is quite a different question, upon which learned judges have entertained opposite opinions." In that case the question was only whether the real estate was to be treated, in equity, as personal property, as between the partners themselves and the creditors of the partnership. The learned judge regarded it as the established doctrine of Courts of Equity that it should be so treated to that extent, and decided accordingly.

In the case of *Burnside et als. vs. Merrick et als.*, in the Supreme Court of Massachusetts, it was held that real estate, purchased by partners, for the partnership business and with the partnership funds, though conveyed to them by such a deed as, in case of other parties, would make them tenants in common, is considered in equity as part of the partnership stock, and is to be applied, if necessary, towards payment of the partnership debts. And that, though such estate is considered, at law, as the several property of the partners, yet it is held subject to a trust arising by implication of law, by which it is liable to be sold and the proceeds brought into the partnership funds, so far as is necessary to pay the debts of the firm. (4 Metcalf, 537.)

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In the case of *Dyer vs. Clark*, in the same Court. (5 Metcalf, 562,) where the subject was elaborately discussed by Chief Justice Shaw, the same doctrine was again laid down as in the case last cited. The reasoning of the learned Judge is extremely clear, and points out how the object of Courts of Equity may be accomplished, so as to secure the rights of all parties, by considering the real estate as held in trust for the purposes of the partnership, without resorting to the extreme doctrine of holding real estate to be converted out and out into personalty, by implication of law. His Honor remarked: "But treating it as a trust, the rights of all parties will be preserved; the legal estate will go to those entitled to it, subject only to a trust and equitable lien to the surviving partner, by which so much of it shall stand charged as may be necessary to accomplish the purposes for which they purchased it. To this extent, and no further, will it be bound; and subject to this, all those will take who are entitled to the property, namely, the creditors, widow, heirs, and all others standing on the rights of the deceased partner." (See also, to the same effect, *Howard et als. vs. Priest et als.*, 5 Metcalf, p. 582.) I am aware that some American authorities favor the adoption of the extreme doctrine, but I think the weight of judicial opinion of that country is against it.

I have intimated before that I think the English Equity Courts have been largely controlled by the necessity of overcoming certain peculiarities of the common law, touching real property. Those peculiarities have no existence in this Kingdom, where real property is always a fund for the payment of debts, equally with personalty, although in some cases the latter must first be exhausted. Nor does the same distinction exist in this country as in England, in regard to inheritance, for with us the heir takes the personalty as well as the realty, saving the widow's share; hence the question as to the conversion of real estate into personalty, and the consequences of such a conversion, do not possess the same prominence here as in England. But a contest is liable to arise in this country at any time, between the widow and the heir or devisees.

I may also observe here, that in most of the English cases upon this subject, the real estate in question had been purchased and used purely for purposes immediately connected with

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the business of the partnership, as, for instance, lands and buildings necessary for trading or manufacturing establishments. There is a clear shade of difference between real property held purely for that purpose, and land purchased with partnership money, conveyed to and held by partners as tenants in common, even where the rents and profits are mixed with the partnership funds and improvements made at the expense of the partnership, but the property is not used as an accessory to the partnership business. In the present case, the principal business of the partnership was that of ship-carpenters, wharfingers, and warehousemen, although the firm was interested in other kinds of business. Much of the real estate, although purchased with partnership funds, was not used for the purposes of the principal partnership business. In the language of the bill, that real estate was held by the partners as tenants in common, subject to a trust in favor of the partnership, that is, as I understand it, so far as the purposes of the partnership might render necessary, and no further. There was no agreement between the partners changing the nature of the property.

The object of the application of the equitable principle in these cases, is the enforcement of equitable claims, and when that object has been accomplished, I am unable to see the propriety in any case, in the absence of an express agreement, of carrying the principle further, to the extent of working an arbitrary and unnecessary change in the nature of property, for no equitable purpose whatever, thus affecting the legal rights of parties in no way connected with the partnership. Certainly no consideration of mere convenience should be suffered to have this effect, as seems to be suggested in some of the English decisions.

As we have seen, Courts may differ widely in opinion as to whether or not real estate, under the circumstances now discussed, should be held as converted into personalty to all intents and purposes, so as even to make it distributable as personalty, among the representatives of a deceased partner, but to a certain extent, the application of the equitable doctrine is well established. For the purposes of the partnership, such as the payment of partnership debts, enforcing the lien of a surviving partner as against the assets of his deceased partner, and the

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adjustment of partnership accounts upon a dissolution, real estate purchased with partnership funds, and held and dealt with as partnership property, will, in equity, so far as may be necessary, be treated as personal property.

At first I was inclined to think that, as in this case there is no occasion to call for the real estate to pay partnership debts, or to meet the lien of the surviving partners for contribution, there was no necessity to treat the real estate as personalty. But, upon reflection, I think it is proper to treat the real estate as personalty, for the purposes of this proceeding, the object of which is a distribution of assets, between the representatives of the deceased partner and the survivors, necessary to the final adjustment of the partnership business. And, in this country, where executors and administrators are clothed with extensive powers in relation to property both real and personal, there seems great propriety in regarding the plaintiff as the proper party, in his character of executor and trustee for devisees, to invoke the order of the Court, and to join with the respondents in the sale and conveyance of the real estate. The share of the deceased partner in the proceeds of the real estate, will be regarded as real estate in the hands of the executor, and dealt with accordingly, under the provisions of the will, and his action in the premises will bind all parties interested.

The order of sale and division is granted, as prayed for.

Mr. Bates, for the plaintiff.

Mr. Austin, for the respondents.

October 18th, 1862.

Rex vs. Joseph Booth.

SUPREME COURT—IN BANCO.

JANUARY TERM, 1863.

REX vs. JOSEPH BOOTH.

THE law prohibiting the sale of intoxicating drinks to natives of this Kingdom, contained in Section 1, Chapter 42d of the Penal Code, held to be constitutional and in accordance with the policy of Hawaiian legislation from the earliest foundation of the present system of Government.

Likewise that the law does not contravene the obligations entered into by the Government in its treaty stipulations with foreign powers.

Judgment of the full Court, per ROBERTSON, J.

The defendant is charged with having violated Section 1st, Chapter 42d of the Penal Code, and pleads not guilty. He admits that on the 29th October, 1862, he sold imported spirituous liquors to natives of this Kingdom, in the town of Honolulu.

It is admitted on the part of the Crown that defendant is a British subject, licensed to sell liquors under the Act of 23d August, 1862, and that he is an importer of spirituous liquors.

The appeal to this Court from the decision of the Court below has been taken purely upon points of law, which have been submitted by defendant's counsel with much labor and care, in a printed brief of great length, accompanied and enforced by oral argument.

Upon examination, I think the numerous points made by the defense, may be comprised in a few general grounds which will embrace the whole subject. In giving my opinion upon the case, therefore, I do not propose to take up the points of defendant's brief *seriatim*, but to advert, in what seems to be the most natural and convenient order, to the general grounds which seem to me to comprise the whole defense.

And first, it is argued that Section 1st, Chapter 42d of the Penal Code, under which the defendant is charged, has been repealed, by implication, through the enactment of subsequent statutes. I shall not now take notice of the argument that the part of the Penal Code referred to was repealed by the 103d

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Article of the Constitution, because that point seems to be comprised in the general ground of unconstitutionality, relied upon by defendant. But it is contended that Section 1st, Chapter 42d of the Penal Code, which prohibits the sale of spirituous liquors, by any person, to a native of the Kingdom, is radically inconsistent with the provisions of the Act of the 23d August, 1862, regulating the sale of spirituous liquors, and under which the defendant obtained his license. It is argued that the later enactment embraces fully the subject matter of the former, which has thereby become superseded.

Against this proposition the Attorney General cites the case of *Rex vs. Elia*, decided at the July term, 1861. In that case the defendant was indicted before the Circuit Court at Kauai for having sold spirituous liquors without license, in contravention of the law of 1846, which regulated the sale of spirituous liquors, previous to the enactment of the statute of 1862. The prosecution proved that the defendant, who was not licensed, had sold spirituous liquors to natives, and his counsel moved the Court to dismiss the case, on the ground that defendant could only be prosecuted under Section 1st, Chapter 42d of the Penal Code. The Circuit Court overruled the motion, and on appeal to this Court, the judgment of the lower Court was affirmed, on the ground that both statutes were in force, and the District Attorney might elect to prosecute the defendant under either the one or the other. In my opinion, the decision of the Court in *Rex vs. Elia* was sound, for the reasons stated at the time, and as the statute of 1862 has merely taken the place of that of 1844, as a law to regulate the vending of spirituous liquors as a branch of internal commerce, the provisions of that statute do not amount to an implied repeal of Section 1st, Chapter 42d of the Penal Code, which is a special penal enactment for the suppression of drunkenness among the natives. How can the statute of 1862 be said to embrace the subject matter of Section 1, Chapter 42 of the Penal Code, when that statute, as the defendant contends, contains no provision whatever touching the selling of liquors to natives? The later statute could only have embraced the matter of the former either by expressly repealing, modifying, or re-enacting the penal provision. The penal law is left untouched; for the mere silence of the statute

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of 1862 on the subject matter of the penal law, cannot affect that law. The penal statute being still in force, I presume the Legislature deemed it unnecessary to repeat, in the Revenue Law of 1862, the general prohibition against the sale of liquors to natives ; but the subject is guarded with great care, by requiring the insertion in the vender's bond of a condition, subjecting him to its penalty in case he violates any law of the Kingdom. As both statutes are alive and in full force, the vender, by subjecting himself to the particular liability of his class, under the Revenue Law, does not become released from the ordinary liability which presses upon all men, under the provisions of the penal law ; so that in case of his infraction of that law, he may, at the option of the Government, be prosecuted either criminally, under the Penal Code, or upon his bond, under the Revenue Law.

The defendant argues further, that, under the law of 1862, licenses to sell spirituous liquors may be granted to natives, and that as a native vender would be prevented by Section 1, Chapter 42 of the Penal Code, from purchasing liquors to sell again, the provision of the Penal Code is radically inconsistent with the law of 1862, and the former law must therefore be regarded as repealed by implication. But the passage of the statute of 1862 has made no change in the law touching this subject. What is now set up as a radical inconsistency between the Penal Code and the Act of 1862, equally existed in the provisions of the License Law of 1846, which while it did not prohibit the granting of licenses to native subjects, did expressly forbid all venders from selling to natives. The statute of 1851 is the same ; and the law of 1862, while it does not prohibit the granting of licenses to natives, does prohibit venders from selling to natives, by binding them not to violate any law of the land in the exercise of their trade. The argument, then, amounts to this, that the provisions of the license laws are in themselves radically inconsistent, and that therefore the prohibition against selling to natives is void. But this is not sound. The circumstance that, under the law as it stands, a native vender would labor under the disadvantage or inconvenience of having to import his liquors, is accidental, or at least but an indirect consequence of the law. I see no inconsistency in the provisions of the law

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which, while it grants the privilege of vending liquors to any one who fulfills certain requirements, and binds himself to comply with certain conditions, prohibits, as one of those conditions, the selling of liquors to native subjects. The point involved in this argument is merely a branch of the larger argument against the constitutionality of the statutory prohibition; for unless the Legislature has exceeded its power in enacting that prohibition, any indirect disadvantage that may arise thence to individuals amounts to nothing. Again the license laws, which regulate any particular branch of internal traffic, must be viewed as in subordination to a general law of the land. The general law, contained in the Penal Code, says that no person whatever shall sell spirituous liquors to a native subject; and unless the license law, which is a particular law, contains a provision amounting to an express declaration that venders may sell to native subjects, the two laws cannot be deemed radically inconsistent. If such a provision existed, the particular law would prevail over the general; but the permission to sell liquors to natives cannot now, in the face of a positive prohibition, be given by, or derived from, negative implication.

But the defendant contends that Section 1, Chapter 42 of the Penal Code is inconsistent, illogical, contradictory and absurd upon its face, and therefore void. That section reads as follows:

“Whoever shall sell, give, purchase, or procure for, and in behalf of any native of this Kingdom, or for his use, any spirituous liquor, or other intoxicating drink or substance, shall be punished by a fine not exceeding two hundred dollars; and in default of the payment of such fine, by imprisonment at hard labor for a term not exceeding two years.”

It is argued that, because the proposition *to* is not used after the verbs *sell* and *give*, that those verbs must be connected with the preposition *for*, and the statute read so as to prohibit only the selling, giving, purchasing or procuring *for* a native, but not the selling or giving *to* him. This is certainly a strained and hypercritical reading of the language of the statute. The meaning of that language when read and construed in the ordinary manner, is so obvious that I am surprised at the amount of labor and ingenuity expended by counsel in the en-

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deavor to build up a construction which, upon examination, will be found to destroy itself, by rendering the law almost nugatory in practice ; and no Court will adopt such a construction when the language of the statute is plainly susceptible of one that will give effect to the avowed purpose of the law-makers, and the declared object of the law. Did the words used by the Legislature, when construed according to their natural sense and the connection in which they stand, result in an absurdity, and fail to effect the declared object of the law, it would not be within the province of the Court, by supplying words which the Legislature had not used, to obviate that absurdity and effectuate the supposed intention of the law-makers. They must use language themselves susceptible of such a construction as will express their intention, or that intention can not be enforced. But where the Legislature has used language which is susceptible of two reasonable constructions, one of which would defeat the declared object of the law, while the other would effectuate that object, it is the duty of the Courts to adopt the latter, for that must be presumed to convey the intention of the Legislature. I do not admit that the construction contended for on behalf of the defendant in this case, is reasonable or practicable, but merely to state what would be an obligatory rule upon the Court, even supposing the defendant to stand in so good a case. Again, admitting that the wording of the law might have been improved, or its meaning placed beyond the possibility of a doubt, by the use of the preposition *to*, that circumstance cannot be pressed beyond its legitimate weight. In the case of *Bloxam vs. Elsee*, 6 Barnwell & Cresswell, 174, the Court said : "The sense and spirit of an Act, however its scope and intention, are primarily to be regarded in the construction, and it matters not that the terms used by the Legislature in delivering its commands, are not the most *apt* to express its meaning, provided the object be plain and intelligible, and expressed with sufficient distinctness to enable the Judge to collect it from any part of the Act. The object once understood, Judges are to so construe the Act as to suppress the mischief and advance the remedy." In the case of *Rex vs. Ramsgate*, 6 Barnwell & Cresswell, 712, the Court held the following language : "When the Legislature has used words

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of a plain and definite import, it would be very dangerous to put upon them a construction which would amount to holding that the Legislature did not mean what it has expressed."

The language of the statute before us is not ambiguous. The words used by the Legislature, taken in their usual signification and proper connection, express a clear and unmistakable meaning, thus: "Whoever shall sell any native of this Kingdom, or for his use, any spirituous liquor, etc.; whoever shall give any native of this Kingdom, or for his use, any spirituous liquor, etc.; whoever shall purchase or procure for and in behalf of any native of this Kingdom, or for his use, any spirituous liquor, etc., shall be punished by a fine," etc. I see no necessity for the use of the preposition *to* in order to make clear the intention of the Legislature to prohibit all persons from selling or giving spirituous liquors to any native, or for his use, and from purchasing or procuring for and in behalf of any native, or for his use, spirituous liquor. To conclude upon this point, let us look at the reading contended for by the defense: "Whoever shall sell for any native of this Kingdom, or for his use, any spirituous liquor, etc.; whoever shall give for any native of this Kingdom, or for his use, any spirituous liquor, etc.; whoever shall purchase or procure for and in behalf of any native of this Kingdom, or for his use, any spirituous liquor," etc. I cannot hesitate for a moment to say that this construction seems to me altogether unreasonable, and that it must be rejected as unsound. But if any doubt can exist upon the construction of the English version of the statute, it is effectually set at rest by reference to the Hawaiian version, the language of which is so clear that the meaning cannot be misunderstood; and although I merely refer to the latter version, in this case, for the purpose of a parallel reading, the Court, in case of an irreconcilable difference, would have to follow that version as the standard. (See *Metcalf vs. Kahai*, 1 Hawaiian Reports, 225; *Hardy vs. Ruggles, et als.*, *ibid*, 255.)

It is argued further, by defendant, that Section 1, Chapter 42d of the Penal Code is unjust and unreasonable in its consequences, and therefore void. I am unable to see the force of this point as stated, for the consequences of that Section are these: that if any person violates its provisions, whether he be

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a licensed vender or not, he subjects himself to a fine of not more than \$200, or imprisonment for not longer than two years. If it is meant to be argued that it would be unjust and unreasonable to exact from any vender who may violate the law the penalty prescribed by the Penal Code, in addition to the penalty of his bond and the forfeiture of his license, under the license law, that is a matter with which the Court has nothing to do, even admitting that the several penalties could be legally exacted, upon which I do not venture any opinion. If counsel mean to say that the provisions of the Penal Code and of the license law, taken together, make an unjust and unreasonable law, because those provisions prescribe a much heavier and more severe punishment against any licensed vender who may sell spirituous liquor to natives, than against an unlicensed person who may commit the same offense, I must say that I do not perceive anything unjust or unreasonable in such a law. It is obvious that licensed venders possess in a hundred fold over unlicensed persons the facilities for a systematic violation of the prohibition, and that their temptations to do so are correspondingly great. It was reasonable, therefore, on the part of the Legislature, to adjust the penalties accordingly. It is the duty of the Legislature to affix such an amount of punishment to the commission of an offense, as will tend to deter men from such commission, and not to ascertain the maximum which offenders can afford to pay, and still go on violating the law. It is not for the Court to say, in any case, that the penalty is excessive and unreasonable, and that therefore the law is void. Take, for example, the offense of smuggling. For a single act of smuggling, however small the amount, a valuable ship may become forfeited to the Government; but an argument in that case, that the punishment was unreasonable, and therefore the Court should hold the law to be void, would deserve no attention.

The next ground of defense to which I shall advert is, that the law prohibiting the sale of spirituous liquors to natives is in conflict with the provisions of Articles 2d and 10th of the treaty with France. By the 10th Article of that treaty, it was stipulated on the part of the Hawaiian Government, "that the importation and the sale of wines and brandies of French origin

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shall not be prohibited in the Hawaiian Islands." Article 2d, the principal end of which is to regulate the commercial and maritime intercourse of the respective subjects of the two Governments, contains, among other provisions, the following : "They shall have the right to buy and to sell of and to whom they please, without any monopoly, contract or exclusive privilege of sale or purchase, prejudicing or restricting in any manner whatever their liberty in this respect. They shall be equally free, in all their purchases as well as in all their sales, to fix the price of their goods, merchandise and objects of every kind, both imported and destined for importation, so long as they comply with the laws and regulations of the country."

Whatever privilege may be rightfully claimed by a French subject, under those provisions, may equally be claimed by the defendant, by virtue of the parity clause in the treaty with Great Britain. It is contended that the freedom of importation which is guaranteed by the treaty, carries with it, as a natural result, freedom of sale ; that as the importation cannot be prohibited by law, neither can the sale be prohibited, or even restricted in any degree ; that the words, "They shall have the right to buy and to sell of and to whom they please," must be taken without any qualification whatever, and extend the right of sale, which follows the right of importation, beyond the power of the slightest limitation or restriction, by municipal law ; and that, therefore, the law which prohibits the sale of spirituous liquors to natives is in direct violation of the treaty.

The language of the treaty is undeniably broad, and the words quoted, if taken by themselves, might be understood as sustaining the defendant's position ; but I understand the general scope and intent of the second article, the whole of which should be read together, to be principally the securing for French subjects, residing in, or visiting this Kingdom, for purposes of trade or commerce, an equality of rights and privileges, in regard to such trade or commerce, with his Majesty's own subjects. That the Hawaiian Government has never understood the treaty stipulations referred to in the light now urged upon the Court by the defendant, is evident. The prohibitory law which is now sought to be overthrown, was in force for many years before the date of the French treaty, and if the provisions of that

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treaty had been understood by his Majesty's Government as conflicting with so important a law, an immediate change must have followed. Yet three successive sessions of the Legislature have been held since that date, and the legislative body has not been called upon by the Executive to repeal the law in question, in order to give effect to the treaty. It is said that the Court has nothing to do with governmental policy. But this is not true to the extent which is claimed, for the Court is supposed to know, and bound to take notice of, the general policy of its own Government. The judicial recognition of that policy becomes necessary in many cases, as throwing light upon the meaning of statutes and treaties. In this case, it is clear that if the Hawaiian Government had ratified the provisions of the treaty, understanding them to mean what is now contended, a line of policy pursued ever since the recognition of Hawaiian Independence, must suddenly have been abandoned. But neither were those provisions so understood by the late Commissioner of France, who negotiated the treaty on behalf of his sovereign. It appears, by reference to the treaty and protocols, as printed by order of the King in Council (see page 76), that a suggestion having been made, in Privy Council, that the treaty "provided for the sale of intoxicating liquors to the King's native subjects, contrary to the Hawaiian municipal laws," the Commissioner solved that doubt, officially, as follows: "That it had never entered into the intention of France to interfere in the system of the Hawaiian laws which regulate the sale of liquors to the natives; it is not the intention of France now. The object of the 10th Article is to protect foreigners, especially the French, against all systematic and absolute prohibition, and at the same time leaving to the Hawaiian Government every liberty in the internal regulation of that special commerce." So, then, it appears that the existing municipal laws are in conformity with his Majesty's treaty engagements, as mutually understood by the two Governments; and this part of the defense must therefore fall to the ground.

The most important ground taken by counsel for the defendant, is the one which yet remains to be considered, namely, that the prohibitory law is in conflict with certain articles of the Constitution, and therefore void. The articles relied upon are the 1st, 14th and 62d, which read as follows:

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Article 1st. God hath created all men free and equal, and endowed them with certain inalienable rights, among which are life and liberty, the right of acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness.

Article 14th. The King conducts his Government for the common good ; for the protection, safety, prosperity and happiness of his people, and not for the profit, honor, or private interest of any one man, family, or class of men among his subjects. Therefore, in making laws for the nation, regard shall be had to the protection, interests and welfare not only of the King, the chiefs and rulers, but of all the people alike.

Article 62d. Full power and authority are hereby given to said Legislature, from time to time, to make all manner of wholesome laws, either with penalties or without, as they shall judge to be for the welfare of the nation, and for the necessary support and defense of good government : Provided the same be not repugnant or contrary to this Constitution.

It is argued that Section 1, Chapter 42 of the Penal Code grants privileges and immunities to one class of citizens which it denies to others, under like circumstances. But this is an incorrect way of putting the case. The law referred to grants no privileges or immunities to any class. On the contrary, it is a prohibitory law, forbidding all men alike from selling or furnishing spirituous liquors to native subjects. The true mode of stating this point of the defense, it seems to me, is this : the object and effect of the prohibitory law being to prevent the sale of liquors to native subjects only, and not to all subjects alike, it is at variance with the spirit of the Constitution. This point, therefore, although stated separately by counsel, is comprised in the general ground, and will be covered as I proceed.

In the case of *Rex vs. Sawyer*, tried before this Court at the July term, 1859, the defendant was prosecuted under the statute prohibiting the manufacture of intoxicating liquors. One ground of defense relied upon in that case was, that the prohibitory law is repugnant to the 1st Article of the Constitution, and therefore void. The Court overruled that part of the defense; and I took occasion at that time to express my opinion that the 1st Article of the Constitution is to be regarded merely

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as a preface, announcing and recognizing, in general terms, political principles, touching the freedom, equality and common rights which lie at the foundation of every liberal, constitutional government, and upon which the Hawaiian Constitution is professedly based ; but that, in the application of those principles, the language in which they are declared is not to be understood in an absolute and unlimited sense. That language must be interpreted, and the application of those principles must be controlled and regulated, by the succeeding provisions of the Constitution—by the expressed or clearly implied requirements, authorizations and limitations of the instrument, regarded as a whole. The bare recognition of those principles is by itself of no practical value without their authoritative application, for, as remarked in the defendant's brief: "The ideas of natural, civil and equal rights are regulated by no fixed standard, and the ablest and purest men have differed upon the subject;" and, in my opinion, the general principles may receive a wider interpretation and a more extended application, from one nation than from another, and yet both one and the other may with equal propriety be said to enjoy political and civil freedom, although in an unequal measure. Those principles were not recognized here for the first time in the Constitution adopted in 1852. They had previously been announced in the declaration of rights prefixed to the Constitution of 1840. They were not embodied in the Constitution, but formed a part of the preface, and were properly styled sentiments, or principles, in general accordance with which the Government was to be conducted. It is unnecessary to prove at length that those sentiments or principles have never been interpreted or deemed applicable in this Kingdom, in the unlimited sense contended for in the present case, and in the case of *Rex vs. Sawyer*.

But it is argued that the enactment of the law now under discussion is what is sometimes denominated class legislation; and that the power of class legislation, or making special laws, does not exist, in view of the provisions of Article 14th of the Constitution. In the case of *Naone vs. Thurston* (Vol. 1 Hawaiian Rep., page 220,) the same ground was raised by defendant, in resistance to the law of 1851, imposing a special and distinct school-tax upon foreigners and subjects of foreign birth or pa-

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rentage. The Court held the law to be constitutional, and that the Hawaiian Legislature always had, and still has, the power of special legislation, at least in the matter of taxation. That decision, however, cannot be regarded as conclusive in the present case, as it did not involve the question of equality as to civil rights and privileges, which is mainly relied upon in the present case, and therefore this ground of defense must be further examined.

It is important, therefore, to ascertain the true meaning and intent of the provisions of Article 14th of the Constitution, already quoted. It will be found that the principles embodied in that Article were, like those recognized in the 1st Article, a part of the declaration of rights prefixed to the Constitution of 1840. That declaration says, "God has also established government, and rule, for the purpose of peace; but in making laws for the nation, it is by no means proper to enact laws for the protection of the rulers only, without also providing protection for their subjects; neither is it proper to enact laws to enrich the chiefs only, without regard to enriching their subjects also; and hereafter there shall by no means be any laws enacted which are at variance with what is above expressed." And, further on, under the head of "Protection for the People Declared," it says: "The above sentiments are hereby published for the purpose of protecting alike, both the people and the chiefs of all these islands, while they maintain a correct deportment; that no chief may be able to oppress any subject, but that chiefs and people may enjoy the same protection, under one and the same law. Protection is hereby secured to the persons of all the people, together with their lands, their building lots, and all their property, while they conform to the laws of the Kingdom, and nothing whatever shall be taken from any individual except by express provision of the laws." The provisions of Article 14th of the Constitution of 1852 are merely a reiteration of a portion of the "sentiments" expressed in the passage just quoted.

Now, under what circumstances, and in what sense, were these sentiments or principles declared and adopted by the rulers of this Kingdom? The history of the country, and the origin of the present form of Government, are familiar to the

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Court, and have a proximate bearing upon this question ; for the Court is not bound to adopt the construction contended for by the defense, merely because general theory might give it a degree of countenance, independent of all practice and the prevailing understanding, since the foundation of the Government. The nation was emerging from its ancient state of absolute despotism, in which the rights of life, liberty and property, so far as the common people or serfs were concerned, were not only insecure, but not recognized as having any existence, beyond the capricious will of the chiefs. The Government, or rather the power to rule, was solely in the hands of the chiefs, who used that power, and ruled over the common people, entirely for their own benefit or aggrandizement. His late Majesty having resolved, with the concurrence of his high chiefs and councillors, to establish his Government upon just principles, granting to the people, equally with the chiefs, certain rights, to be held and enjoyed according to fixed laws, and not at the will of any superior lord, proclaimed the Constitution of 1840, and announced, in substance, the same sentiments and principles now to be found in the 1st and 14th Articles of the present Constitution. The voice of absolute authority decreed that, in future, the King would conduct his Government for the common good, and not for the honor, profit or private interest of any particular family, or of the ruling class ; and that in making laws for the nation, regard should be had to the protection, interest and welfare of the common people, equally with the King, chiefs and rulers. The controlling idea therefore is perfectly manifest, and the sense in which the language of the Constitution was used cannot be mistaken. Indeed, the form of expression used in the 14th Article scarcely admits of an argument. In that sense, and in that only, it is true that the Hawaiian Legislature has not the power of special legislation. With this reservation, it has that power, and may use it at its discretion, so long as the power is exercised in conformity with the letter and spirit of the 62d Article of the Constitution. But, says the defendant's counsel, "The nature and ends of legislative power limit the exercise of it ; and there are certain vital principles in every constitutional Government which determine and overrule apparent and flagrant abuses of legislative

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power." This is emphatically sound. It is the very rule by which, as I understand it, I am endeavoring to test the validity of the law now under discussion, and by which the validity of every law upon the statute book is liable to be tried. Whenever it shall appear that the Hawaiian Legislature has clearly transcended its power, and committed any such abuse, this Court will administer the remedy. But to hold that Section 1, Chapter 42 of the Penal Code enhances the profit, honor, or private interest of any particular family, or of the higher classes only; or that it does not as much regard the protection, interest and welfare of the common people as of the chiefs and rulers, would be a perversion of the plain language and intent of the 14th Article of the Constitution; and the assertion that the law in question degrades his Majesty's native subjects to a condition of slavery or serfdom, is sheer extravagance, a total misapplication of terms.

The defendant's counsel admitted, in the course of his argument, that there is no provision in the Constitution which could prevent the Legislature from enacting a law to prohibit, entirely, the importation and sale of spirituous liquors within this Kingdom. In my opinion, this is true. But counsel went on to argue that because the Government has yielded, by the treaty stipulations already referred to, a part of the power of sovereignty, and can no longer prohibit the importation and sale of liquors by and to foreigners, that, therefore, the whole power is lost, and the Legislature can not enact a law to confine the traffic to foreigners, and prohibit the sale to natives. But is this logical? Because the exercise of the legislative power is restrained in part by treaty, does it follow that the power, so far as it is not affected by the treaty, may not still be exercised up to the limit allowed by the Constitution? I think not.

But it is contended that "It is an axiom in all constitutional Governments, that all legislative power emanates from the people; the Legislature acts by delegated authority, and only as the agent of the people;" that the Hawaiian Constitution was founded by the people; "that the Government of this Kingdom proceeds directly from the people, was ordained and established by the people." and that it is against all reason

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and justice to suppose or presume for one moment, that the native subjects of this Kingdom ever entrusted the Legislature with the power to enact such a law as that under discussion.

Here is a grave mistake—a fundamental error—which is no doubt the source of much misconception. These ideas run through a large part of the case made by the defense, and much of the argument and reasoning predicated upon them, possesses no weight whatever. The Hawaiian Government was not established by the people; the Constitution did not emanate from them; they were not consulted in their aggregate capacity or in convention, and they had no direct voice in founding either the Government or the Constitution. King Kamehameha III. originally possessed, in his own person, all the attributes of absolute sovereignty. Of his own free will he granted the Constitution of 1840, as a boon to his country and people, establishing his Government upon a declared plan or system, having reference not only to the permanency of his Throne and Dynasty, but to the Government of his country according to fixed laws and civilized usage, in lieu of what may be styled the feudal, but chaotic and uncertain system, which previously prevailed. The recognition of his independence by the great powers of Christendom; the claims of commerce; the influx of foreigners, and the gradual advancement of his native subjects, rendered necessary still further changes. The Government had to be regularly organized, the different powers separated and defined, and the whole land system of the Kingdom to be remodelled. The first Constitution no longer furnished a sufficiently broad foundation. The King, by and with the advice and consent of the Nobles and the House of Representatives, voluntarily granted and proclaimed the present Constitution on the 14th of June, 1852. As before, the people at large were not consulted, and they performed no direct part in the adoption of the Constitution. That instrument was framed and sanctioned by the legislative body, consisting of the King, the House of Nobles and the House of Representatives, in whom, collectively, is now vested that supreme, absolute power of legislation, which was originally vested in the Monarch alone. Not a particle of power was derived from the people.

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Originally the attribute of the King alone, it is now the attribute of the King and of those whom, in granting the Constitution, he has voluntarily associated with himself in its exercise. No law can be enacted in the name, or by the authority of the people. The only share in the sovereignty possessed by the people, is the power to elect the members of the House of Representatives; and the members of that House are not mere delegates. The several parts of the Legislative body, acting in unison, have power to change the form of Government, to amend and modify the Constitution, or to abrogate it entirely and adopt another, without ratification by the people at large, as they did in 1852; and they possess full power to enact all manner of wholesome laws, general or special, which in their wisdom they may deem conducive to that highest of all objects—the public weal, within the express restraints of the Constitution. They are limited to that extent, and no further, by the rules which they have prescribed for themselves.

It has not been argued, nor could it have been with propriety, that the law prohibiting the sale of spirituous liquors to natives is pernicious in its effects, or that it is not a wholesome law, within the meaning of the 62d Article of the Constitution; and there can be no question that it tends to promote the well-being of his Majesty's native subjects, and assists in promoting the material interests and general welfare of the nation at large. The subject of the importation and sale of spirituous liquors in this Kingdom, has always been treated by the Government as a specialty, and the traffic has ever been kept under stringent regulations. With the limitation resulting from the treaty engagements already spoken of, the Legislature has full power over this subject, and so long as the law makers deem it wise to maintain the prohibition, it is the imperative duty of executive and judicial officers to enforce it.

In my opinion, the judgment of the Police Justice should be affirmed.

ALLEN, C. J.

It is contended by the counsel for the respondent, that the law which is alleged to have been violated by him is unconstitutional and in derogation of the rights, privileges and immuni-

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ties of native subjects. Questions which involve constitutional provisions, are always of the most grave and serious character, and should receive the most anxious consideration.

It is alleged that the Government, under the present Constitution, emanated directly from the people, and was ordained and established by them. It may be well for the full elucidation of the question involved, to review briefly the history of its formation. It is not necessary for this purpose to revert to the Government of these Islands prior to the time of Kamehameha I. The entire group were conquered by him, and he was the founder of the Kingdom, and all the lands belonged to him, a portion of which he divided, according to ancient usage, among his warrior chiefs, and they did the same to an inferior order of chiefs, by whom they were subdivided again and again ; but the title was in the King, and there was no one who could make a conveyance without his consent or direction. All persons in possession of lands, no matter whether chiefs or people, owed and paid a land tax, which the King assessed at pleasure ; and also he called for service at his discretion, on all grades, from the highest down. They also paid, in addition to the yearly taxes, some portion of the productions of the land. In addition, they owed obedience at all times. The treaty which was negotiated in 1836, between this Government, and Lord Edward Russell on behalf of the British Government, shows the views then entertained by the contracting parties. It is therein declared "that the land on which the houses were built is the property of the King." This sketch illustrates the nature of the tenures, and the titles by which the lands were held. Land was the main property which gave authority. It was the only resource to support the retainers which were necessary to sustain the dignity of the King and his chiefs, and as the titles of all the lands were held by the King, it was literally true that the Kingdom was his. The Government was as exclusively in him as the titles to the lands were. When Kamehameha I. died, his will was : "The Kingdom is Liholiho's, and Kaahumanu is his Minister." In his time, "life and death, condemnation and acquittal," were in the hands of Kaahumanu, who was then, as declared in the first Constitution, the Premier of the Kingdom. This officer transacted business under the authority of the King.

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On the 8th of October 1840, Kamehameha III. granted to his people a Constitution, which on that day was agreed to by the Nobles, but it was then declared that "it should not be considered as finally established, until the people have generally heard it, and have appointed persons according to the provisions therein made, and they have given their assent by their Representatives, then this Constitution shall be considered as permanently established." This Constitution contained a declaration of rights. It declared, "God had bestowed certain rights alike on all men, and all chiefs, and all people, of all lands, and that some of the rights which God had given alike to every man and every chief of correct deportment, were life, limb, liberty, freedom from oppression; the earnings of his hands and the productions of his mind, not however to those who act in violation of the laws." It secured protection to "the persons of all the people." It permanently confirms the Kingdom to Kamehameha III. and his heirs. A House of Representatives was established, and there were some salutary provisions of law contained in it not properly within the legitimate measures of a constitution. But probably for the day subserved their purposes. It will be seen that this Constitution was a grant from the King. Whatever power or rights which he alienated by this Constitution, was done from his own convictions of justice and of duty. The Constitution did not proceed from the people, neither was it ordained or established by them. From the consideration which he bore them, he declares to them, in the instrument itself, that it shall not be considered as finally established, until the people, by their Representatives, have assented to it. There is no place in this Kingdom made memorable like Runnymede, where the Barons of England compelled King John to grant Magna Charta. Neither the chiefs or people have ever compelled the Kamehamehas by the sword to grant them a constitution. It was a free will offering on the part of the King. It was regarded by him as a measure of wisdom to give strength to his Kingdom, symmetry to its laws and prosperity to his people. The first Constitution was limited in its provisions, and was thought not to answer fully the great purposes of such an instrument. In 1852, the same King which granted the Constitution of 1840, by and with the advice and consent of the

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Nobles and Representatives of the people in legislative council assembled, granted the Constitution which is now in force. Like the Constitution of 1840, it was a grant from the King himself, and not secured by any act of the people, other than the assent of their Representatives, which the King most graciously suggested as a matter proper for their consideration and for the expression of their wishes. The declaration of rights evinces enlarged "and liberal political views, and a determination to conduct his Government for the common good, and for the protection, safety, prosperity and happiness of his people." Although it is very evident that the Constitution was a grant from the King, and not coerced by the chiefs or people, still it was a grant made by their advice and consent. It has no less binding force than if it had been the result of a revolution, although between the parties to the instrument it would doubtless have less technical and exacting rules of construction than if won by the sword. In the one case it is a grant from personal feeling, and in the other a charter secured by force. It was made in the nature of a gift, designed with other purposes to protect them in their personal liberty, and in the enjoyment of the fruits of their labor. It was the virtual abolition of a system which resembled the feudal system of a portion of Europe, and which was never imposed on the foreigner here ; and while the Constitution amply secures him in all his rights, it was never designed to preclude the benefits and advantages of such legislation as the Hawaiians should regard as adapted to their peculiar condition ; always premising that it does not affect injuriously the rights of the foreigner.

• Most of the foreigners at the time of the adoption of the Constitution were under the protection of treaties and the law of nations.

The history of the Hawaiian Government and laws, prior and subsequent to the adoption of the Constitution, and the true meaning of the terms of the Constitution itself, fully sustain this construction.

The argument of counsel was very able and eloquent in its application to the rights of British subjects under the British Constitution, and to the rights of an American citizen under the Constitution of the United States, on the great principle

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that laws should affect all people alike ; but its fallacy consisted in its misapprehension of the true spirit, intent and purpose of the Hawaiian Constitution as applicable to Hawaiians. It is the great charter of the rights of the King, the chiefs and the people, for it has been so declared by mutual accord. But in giving a construction to its provisions, if there ever was an instance when the history of the grant and of the people, and the contemporaneous history of its laws, should have an influence in its construction it is unquestionably in this.

The Legislature of the Kingdom has always been peculiar in this, that it has made certain provisions of laws exclusively in reference to native subjects, since the formation of the Government.

For example, it has, by the law of 1846, interdicted the enlistment of natives as sailors on a foreign vessel without the compliance with certain requisitions, especially prescribed, and even then the power was placed in the hands of the Governor to grant or refuse the application for enlistment. A bond was required also to return the enlisted natives. By the Civil Code, a law similar in its provisions is re-enacted. The penalty is made higher by the last law. The master of the vessel is made liable to a penalty of five hundred dollars for taking a native out of the Kingdom, as a seaman or otherwise, without obtaining the consent of the Governor, and his vessel is liable to seizure, condemnation and sale to satisfy the same.

There are in force certain laws for the establishment of English schools for Hawaiian youth, on the several islands, at such places as are deemed most advantageous for extending a knowledge of the English language among the natives, and money is appropriated and expended for that specific purpose.

It is also made lawful for the Board of Education to establish family schools, for the domestic training of Hawaiian girls in which the English language shall be taught—and money is appropriated for this specific purpose.

The history of our whole legislation shows that many laws have been passed which applied to the native subjects exclusively. Laws similar in provision, and for the same object, applicable exclusively to the native race, have met the approval of the King, Nobles and the Representatives of the people, at

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different periods since the year 1846, which is conclusive evidence that in their judgment the unrestricted use of spirituous liquors is dangerous in its consequences. For the good of the people, in their wisdom they have passed these laws. At any session of the Legislative Council they could have repealed them ; but they have not deemed it wise legislation to do so. At any future Legislature they can do it, if they feel assured that the health and life of the people will not be endangered.

In the 14th Article are these words : " In making laws for the nation, regard shall be had for the protection, interests and welfare, not only of the King, the chiefs and rulers, but of all the people alike." All the laws which have been passed, applicable exclusively to Hawaiians, are applicable to all Hawaiians alike; and because they do not embrace the foreigners, this constitutional question is raised. My own view is, that in forming the Constitution it was not the intention of the framers to prohibit legislation exclusively applicable to native subjects. Many of the men who were participants in framing the Constitution were members of the legislative councils which have passed this class of laws. The counsel have pictured much injury to the Hawaiian by this construction. All branches of the legislative council always have been Hawaiian, and two branches at least will be as long as this Constitution exists, and any laws which they pass apply alike to all Hawaiians, and of course, to themselves, and cannot conflict with any of their constitutional rights; hence it is that the native subject can be in no especial danger in his civil or political rights. While some laws have been enacted of a restrictive character, such as the law in question, the law of shipping native seamen, and of restraining natives from leaving the Islands without the Governor's consent, many provisions have been made especially for their benefit, to some of which I have already adverted. There can be no complaint of this construction from the foreigner, for whether a subject or not, the restricting laws do not apply to him. There is a peculiarity in the Government and in the business affairs of the whole nation, in this, the union and a co-operation of the foreign element with the aboriginal. Its workings have been harmonious and mutually useful. And while it has been so, it has been the gracious policy of the aboriginal race, in whom was vested the legislative

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power, in passing laws of a restrictive character, to apply them exclusively to themselves. It ill becomes the foreigner to complain of this application, and it never could have been the meaning and intent of the framers of the Constitution to exclude from the legislative council the power to pass laws exclusively applicable to Hawaiian subjects, while those laws were in accordance with the spirit and genius of their Constitution. The aboriginal race would have never surrendered this power, because they always have been aware, and more especially at the period when the Constitution was adopted, that there were some laws which were regarded as wise for them, which were not applicable to foreigners, or at least would tend to promote difficulties, even if not in conflict with treaty stipulations.

A law containing this prohibition of sale to native subjects was passed by a legislative council, composed mainly, in the House of Representatives, of aboriginal inhabitants, elected by the suffrages of the people ; and in the House of Nobles, by the high chiefs of the land, together with the Ministers, and finally approved by his Majesty the King. The law is the result of the deliberations of those who represent the aboriginal race, and it is sought to be defeated by a resident British subject on the special ground that the native is deprived of his constitutional rights in being under a prohibition to purchase ardent spirits at his hotel. The law has been in operation many years, and the native population sustain it on the ground that it is necessary for the health and lives of the people. While we as a Court are bound by the terms of the Constitution and laws, at the same time it is our duty to apply a sound common sense in their interpretation. It is an historical fact that when a foreign population makes a settlement with an aboriginal race, that while they introduce many good customs, they too often introduce many which are injurious, and of all the various tastes which they have introduced which is dangerous to the life of the aboriginal race, none equals that of a love of ardent spirits. It has generally proved fatal to their existence ; and when this very people, aware of the fatal consequences of the unrestricted sale of ardent spirits, enact and re-enact laws for this purpose, it ill becomes the foreign race to take the advantage of a technical and verbal criticism, which the history of their legislation

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fully proves is entirely unsound. The importance of some acts of legislation adapted especially to the natives, has always been regarded as promotive of the rights and interests of both, and often necessary. It is becoming less and less so, still there are and have been laws not necessary or desirable in their application to the foreigner, but which have been thought by the King, Chiefs and Representatives of the people themselves, as necessary for the protection and welfare of the native race. While the native population very largely predominates, still, in commerce and general business, the foreigners exert a large influence, and we regard it as the part of wisdom, that the peculiar wants, necessities and dangers of the native subjects should be especially regarded by legislation.

The counsel for the respondent further contended that the law in question is in violation of the 2d and 10th Articles of the treaty with France and this Kingdom, and by parity with all other countries having treaty stipulations with the Hawaiian Government, the substance of which articles, as the counsel allege, are embraced in the following extracts :

ARTICLE 2d. "There shall be reciprocal liberty of commerce between all the territories of the French Empire, in Europe, and those of the Hawaiian Islands, and their respective subjects shall have the right to buy and to sell, of and to whom they please, without any monopoly, contract, or exclusive privilege of sale or purchase, prejudicing or restricting in any manner whatever, their liberty in this respect."

ARTICLE 10th. "It is agreed that the importation and sale of wines and brandies of French origin shall not be prohibited in the Hawaiian Islands."

The first treaty made with France bears date on the 26th of March, 1846, and is in terms the same as that made with the Government of Great Britain of same date. The 6th Article provides that, "French merchandise or goods recognized as coming from the French dominions, shall not be prohibited, nor shall they be subject to an import duty higher than five per cent. *ad valorem*. Wines, brandies, and other spirituous liquors are, however, excepted from this stipulation, and shall be liable to such reasonable duty as the Hawaiian Government may think fit to lay upon them, provided always that the amount of duty

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shall not be so high as absolutely to prohibit the importation of the said articles." At this time the digest of the Constitution and laws, and a project of the organic acts, were under consideration by the Nobles and Representatives, among which was a provision imposing a penalty for the sale of spirituous liquors to natives. These acts were approved by the King on the 27th April of the same year.

It is a matter of history that France made great complaint that the laws imposing duties on spirituous liquors were so high, that it was against the spirit of the treaty, but none whatever against the restrictions imposed on the sale to natives.

In December, 1849, the American treaty was negotiated at Washington, and ratified in August, 1850. Article 9th of said treaty gives to the "citizens and subjects of the contracting parties, freedom in the states of the other to manage their own affairs themselves, or commit them to the charge of any one whom they may select. The buyer and seller have the right to bargain together, and to fix the price of any goods or merchandise imported into, or to be exported from the states or dominions of the contracting parties, except in cases where the laws and usages of the country require the intervention of special agents. But nothing contained in this or any other article of the present treaty, shall be construed to authorize the sale of spirituous liquors to the natives of the Sandwich Islands, further than such sales may be allowed by the Hawaiian laws."

In 1850 the statute in question was passed, which imposed additional restrictions on the sale of spirituous liquor and other intoxicating drinks or substances to natives of the Kingdom. The French treaty, by virtue of which the respondent claims the right of sale, was ratified in 1858. This treaty is especially distinguished for its express regard to the laws of each country. For example, Article 2d, which, with Article 10th, the counsel regard as controlling the law in question, declares that "they (the parties) shall have liberty to trade from place to place, under the provisions of the laws. They shall have liberty in their respective territories, to travel or reside, trade by wholesale or retail as native subjects." The whole paragraph, of which the counsel took a part, is in these words: "They

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shall have the right to buy and to sell of and to whom they please, without any monopoly, contract or exclusive privilege of sale or purchase, prejudicing or restricting in any manner whatever, their liberty in this respect. They shall be equally free in all their purchases, as well as in all their sales, to fix the price of their goods, merchandise and objects of every kind, both imported and destined for exportation, so long as they comply with the laws and regulations of the country."

It is very clear, as contended for by the counsel for the respondent, that parties have the right to buy and sell of and to whom they please, "so long as they comply with the laws and regulations of the country." This is an express stipulation to that very article, and a controlling part of it. If the position taken by the counsel is sound, Hawaiians can go to Paris, and there "will have the right to buy and to sell of and to whom they please, without monopoly, contract or exclusive privilege of sale or purchase, prejudicing or restricting in any manner whatever their liberty in this respect." This freedom, from the necessities of a license, or of regard for any of the regulations of trade of the place, would be valuable, and it is a mutual grant unknown in the history of treaties. If the counsel, in their construction of this article, had borne in mind an established principle, that every part of a treaty is to be considered, and the intention is to be extracted from the whole, they would see that while the parties had a right to buy and to sell of and to whom they please, only "so long as they comply with the laws and the regulations of the country." The 10th Article contains the further provision "that the parties shall not be subjected, in any of the aforesaid cases, to other charges, taxes or imposts at the Custom House than those to which native subjects are subjected," limiting the interpretation of the article to its own terms, and even excluding for the moment from consideration the object and intent of the whole treaty, and it is clear that the buying and selling must be in conformity to the laws and regulations of the country.

By Article 10th, "It is agreed, that the importation and the sale of wines and brandies shall not be prohibited in the Hawaiian Islands." The rate of duties to be imposed is detailed in this article. The treaty of 1840 contained a provision that

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the duties on these articles should not be so high as absolutely to prohibit their importation. France made especial complaint against the duties imposed at that time, and sought by the new treaty to have them reduced, which was subsequently done by the Legislature ; but it is a matter of political history that they have never made complaints against the restricting provision. By this article, the duties are expressly set forth, and an importation only requires a compliance with its provisions. When the articles are in the country, the sale cannot be prohibited, but must be made according to the laws and regulations of the country. It is not contended that the law works a prohibition, but a restriction or limitation only. The law in question was in force when the treaty was made, and, of course, the contracting parties are supposed to know of this restriction in the sale. Why then, if it was the intention to give the "right to buy and to sell wines of French origin of and to whom they please," was not language employed which imparts that meaning and intention? There may be limitation or restriction in the sale of an article which by treaty or by the laws it is legal to import and to sell, but there shall be no "prohibition." It is not contended that there is. How then does the law conflict with the treaty in its terms? The law does not prohibit the sale, but it regulates, controls and limits it. Treaties and other contracts are to be construed according to their intent. "All international treaties," says Grotius, "are covenants, *bona fide*, and are, therefore, to be equitably and not technically construed."

By the French treaty of 1846, it was provided that no duties should be imposed which would prohibit the importation. About the same time, a law was passed by which it was rendered necessary for a person who purchased a license to retail spirituous liquors, to give a bond, with surety in the penal sum of five hundred dollars, that he would not sell or furnish the same to any native subjects of these islands, and by doing so, he not only forfeited the penalty, but his license also. The law in question was passed in 1850. It will be seen therefrom, that this restriction of the sale was for many years prior to the date of the French treaty now in force. Had it been the intent of the contracting parties to remove this restriction, it would not only have been expressed in the 10th Article, but a duty to

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comply with the laws and regulations of this country in buying and selling would not expressly have been imposed by Article 2d. Phillimore says, "that abrogated treaties often furnish a necessary means of construing those which are in force. A due and judicial regard should be had to the occasion which produced them, the subject matter of their stipulation, and the object for which, and the epoch, during which they were contracted."

Article 10th of the treaty in force contains a detailed account of the duties to which the contracting parties agreed. The controversy under the old treaty arose from the amount of duties imposed by the Hawaiian Legislature. It was contended on the part of France, that the duties were so high that they were hostile to the true intent and spirit of the treaty; and hence she insisted upon the duties being made specific in the treaty itself. While this is particularly done, there is no reference to the restriction imposed upon the sale—this having been in force for the whole existence of the old treaty. If it had not been regarded by France as legitimate and in conformity to the true intent and meaning of the treaty, her Minister would have insisted upon a provision to guard against it in the future.

This Government has treaties with most of the commercial States, and yet no complaint has been made of a violation of their stipulations in this particular. It has never been contended by any party to a treaty, that it was an object to secure a sale of spirituous liquors to native subjects; and the Court do not believe that any civilized nation would entertain such a purpose. That the parties to the French treaty have never given or contended for such a construction, is conclusive evidence that it was not so understood, and that the 10th Article contained no such purpose. It is very clear that the law in question is not in conflict with the language of this treaty; and it would be a singular technical construction of a treaty to defeat by implication a law of a nation which was regarded as essential to the health and life of its people.

It is considered a sound rule to have regard to the consequences, to the justice or injustice, advantages or disadvantages, which would ensue from affixing a particular meaning to doubt-

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ful expressions. (2 Phil., 89.) The construction which the Court gives does not depend upon doubtful expressions, but upon the entire absence of any expressions from which a restriction could be inferred. It is not necessary to refer to the consequences of having an unrestricted sale of spirituous liquors; but if regard is had to the consequences which might result from a defeat of the law, there can be no doubt of the interpretation of the treaty. The law in question was in force when the treaty was ratified, and had been for many years. Even in equity and fair dealing, to permit the sale as when the treaty was made, gives all the advantages the party had a right to expect. All nations who by treaties permit the importation and sale of spirituous liquors, impose such duties for license as they deem proper, and make such other regulations as legitimately appertain to the police power. "The power which every independent nation possesses to regulate its internal commerce, as well as its police, and to direct how, when and where it shall be conducted in articles intimately connected either with public morals or public safety, or the public prosperity," cannot be surrendered by doubtful construction of a treaty stipulation, or by the still more doubtful inferences from its terms. In a case of doubt even, it addresses itself to the political, rather than the judicial department, in the first instance. The material purpose of France in negotiating this treaty was to effect a reduction in the duties on her wines and brandies, and if she regarded that her rights had been violated by this restriction, it is more than probable that she would have entered her complaints. There is no doubt that this construction carries out the full intent and purpose of the contracting parties. It is not in accordance with the general history of nations, in their diplomatic relations, to refrain from asking the execution of the treaty in all advantageous particulars. A treaty is but a contract between two nations, and who can give its true meaning and intent better than themselves. It must contain stipulations, clear and definite, before third parties can take advantage of it, when opposed to the acts and construction of the parties themselves.

There is no injustice done the respondent. When he took the license he knew its conditions. This provision of law has been in force for many years. Under this decision he will

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continue to have the same rights of sale by virtue of his license, as it was understood by the contracting parties to it that he would have. But he seeks to extend that license by the claim of a Constitutional right of sale to the whole native population, which the law prohibits, and in reference to which the contract for a license was made. He will continue to enjoy all the advantages for which he contracted and paid, and, equitably, he can claim no more. In saying this, the Court do not controvert the legal principle that he should not be held responsible for the violation of a law which is unconstitutional. I am only adverting to his rights in *foro conscientie*.

My associate has ably presented the whole case, and I shall not advert to other points raised by the counsel for the respondent, for I fully accord with the legal exposition of them made by Justice Robertson.

Judgment of the Police Court affirmed.

Attorney-General Harris, for the Crown.

Mr. Gregg and Mr. Montgomery, for the defendant.

March, 1863.

SUPREME COURT—IN ADMIRALTY.

WILBERFORCE DUDLEY *vs.* JOHN WILKINSON.

THE libellant claimed ten months wages as master of a vessel, and the respondent denied any indebtedness. An account in any further detail is unnecessary for the purpose of making a demand.

A careful consideration is given to the testimony in relation to the alleged agreement for sailing the vessel.

ALLEN, C. J.

It is alleged in the libel, that the libellant was employed, on the 4th day of June, 1861, by the respondent, who was owner of the bark "Kathleen," to perform the duties of master of said vessel, and proceed in command of her from the port of Honolulu to San Francisco, said bark being consigned to Mr. A.

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P. Everett, with power to sell, and if a sale was not effected, to charter her; that the libellant in pursuance of said agreement took command of said vessel at this port, and proceeded to San Francisco, where he arrived on the 22d day of July, 1861. The consignee failing to effect a sale, chartered the vessel for the port of Geelong, in the colony of Victoria, Australia, with a cargo of wheat, from thence to New Castle for a return cargo of coal for San Francisco; and the said libellant took command of said vessel, for said voyage. It appears that the vessel, after some disaster, arrived in San Francisco, and delivered the coals remaining to the charterers—a portion having been thrown overboard for the preservation of the vessel. On arrival in San Francisco, the agent, Mr. Everett, having left the city, entrusted the agency to Messrs. McRuer & Merrill, who directed the libellant to proceed with the vessel to Honolulu, where he arrived on the 12th of April, last past, and paid to the respondent all the money in his hands, resulting from the voyage, his wages not being paid. He now claims the highest rate of wages as master, from the time he was employed at Honolulu till his return in April, 1862, there having been no specific agreement made.

It is admitted that the respondent is owner of the bark "Kathleen," and that the libellant was master during the voyage, as set forth in the libel; but it is denied that a sufficient demand has been made for settlement and payment. It is further averred in the answer that there was an agreement by the parties, that the libellant should sail the said bark for one-third of the profits, to be derived from her employment, but unfortunately no profits have been derived from said service.

It appears, in evidence, that the counsel of the libellant addressed a note to the British Consul, claiming ten months wages as master of said bark, in which he says that the respondent declines to pay his wages, and asks the Consul's interposition. Whereupon the Consul addressed a note to the libellee on the subject, and received in reply an acknowledgement of his note, with a copy of the note of the counsel for the libellant to Mr. Green, and requested an account of the receipts and disbursements of the bark, which were duly made and presented.

Mr. Green testifies that the parties met in his office in regard

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to the settlement of the accounts, and then Mr. Wilkinson stated that the master agreed to go on thirds, and as there were no profits there were no wages, which the master denied.

It is clear from this statement that there was a claim presented for ten months wages, and a positive denial of the payment of any sum, on the ground that the master had undertaken to serve on shares, and that the voyage having resulted without profit, he was not entitled to any compensation.

The object of the demand is to enable the parties to settle without a suit, and in all this class of cases it is a legal necessity. In this case the evidence is conclusive that an opportunity was afforded for a settlement, but the respondent denying any indebtedness, there was no occasion for the libellant to make out an account in any farther detail than he had. He claimed ten months wages; the respondent denies any indebtedness. His answer, if true, was a just denial; for if the contract was for a share of profits, there was no claim for wages. Therefore the Court is clearly of opinion that a sufficient demand had been made by the libellant to enable him to institute a suit.

But the serious question in the case is, whether there was an agreement by the parties, that the master should sail the vessel on shares, as averred in the answer.

It is alleged and admitted that the owner sent to Mr. Everett of San Francisco, by the master, when he sailed for that port, a power of attorney to sell the vessel, and if he did not succeed in making the sale, that he should do his best in chartering her. Not being able to effect a sale on terms deemed by him satisfactory, he negotiated a charter for Australia and for a return cargo to San Francisco, all which was accomplished, the business there being done by Mr. Everett, and by his substitutes, McRuer & Merrill. The respondent introduced Mr. Place, who testified that he heard some conversation between the parties, at Mr. Wilkinson's Hotel, in which the captain, having requested the respondent to give him some ale, asked him which was the most expensive, the bottled or the draught ale, and if he expected him to pay one-third of that, as he had for the other things, to which he replied that he did.

Mr. Hart testifies that he was at work on board the "Kathleen" discharging coals, and asked the libellant for some spun-

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yarn, he replied that he had not got any, whereupon the witness sent to the Government Store for some, and much more was brought than was necessary for his use at the time. The libellant said, you had better leave it on board the ship. Witness replied, you can "buy plenty on shore," to which libellant replied that, he felt himself rather poor and not able to buy it, being a new man as captain of a vessel. Witness told him it was nothing out of his pocket, but, he said it was, as he was on shares in the vessel. The witness further states that Mr. Dudley was mate at this time.

Mr. Ruddock testifies that the parties requested him to keep the bark's account separate; and heard the captain say, when shipping a man, that, as he had to pay part of the wages himself, he should ship whom he thought proper. He said further, that he heard the respondent say to the captain, that the more he made for him the more he would make for himself, to which the captain replied, that he was aware of it, and should do his best. Witness says further, "I heard Wilkinson say, in presence of Dudley, that the vessel was to be sold in California, if it would fetch its price, and if not, he was to get a cargo of light freight back to these Islands, but not to proceed to the South Seas. Dudley sanctioned that. Dudley sailed upon that understanding to the best of my knowledge. That was the same day the vessel sailed. I could not tell you what Wilkinson meant by saying to Dudley, that the better he did for him, the better he would do for himself, but, from what I heard Wilkinson say after, I supposed that, he, Dudley was going to sail her on shares to California and back to Honolulu."

It is very much to be regretted that contracts of this character are not in writing. So far as the shipment of seamen is concerned, it is necessary, in most countries, to make the contract obligatory. Parole testimony usually, as in this case, is most unsatisfactory. It gives incidental conversation only. There is no testimony of the terms of the entire contract, or of the share, whether one-third or one-half, any further than it is a matter of inference from the proportion the Captain says he is obliged to pay for the ale. Ruddock's testimony is quite conclusive as regards the extent of the voyage. That it was to San Francisco, and if the vessel was not sold, that she should

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return to Honolulu. The letter of attorney to Mr. Everett, empowered him to sell, so that, so far as this testimony influences the case, it is apparent that the object of the owner was to make sale of the vessel, and if not sold, to have her return here. But the agents at San Francisco gave a different direction to the vessel; and sent her to Australia. The weight of evidence limits the contract of shares to San Francisco and back to this port. Unless there is proof that the captain acquiesced in this charter to Australia, so that he would sail on the same terms as he had done before, it cannot prevail. As the case stands, had the vessel made a large charter and the captain claimed a share of the profits, and the owner claimed to pay wages, there can be no question that the latter would prevail. There is no evidence that the contract extended to any charter which might be made in San Francisco—for a charter was not anticipated unless to return to this port. It is very apparent that the owner was very hostile to any arrangement for a voyage to the South Seas. In view of the whole matter I am satisfied that the contract embraced the voyage on shares to San Francisco and back to this port, and no more. It is contended that as the captain had made no bargain with Everett, it follows that the same bargain made in Honolulu would be in force under the charter to Australia. This would be certainly true if the agreement extended to any voyage which the bark might make, but, the evidence of navigating the vessel on shares, extends only to San Francisco and back to Honolulu; and to sustain the position of the counsel for the respondent, it is incumbent upon him to prove that the master and owner had, by their agreement, extended the same on the voyage to Australia, which he has failed to do.

The Court, therefore, decrees that the libellant is entitled to recover of libellee wages for his services as master of the bark "Kathleen," from San Francisco to Australia and back to San Francisco and thence to this port. And it is ordered that it be referred to the Clerk of the Court acting as master, to make up an account of wages, deducting the amount of money the libellant has received.

Mr. Montgomery, for the libellant.

Mr. Harris, for the respondent.

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SUPREME COURT—IN PROBATE.

IN THE MATTER OF THE WILL OF JOHN ELY, OF KAHUA, HILO.

THE testator being unable to read the will himself, and there being no express proof that it was read over to him, the *onus probandi* is cast upon the proponent of showing that the testator had a knowledge of the contents, from which he may fairly be considered to have discharged himself, upon proof of the due execution of the will and the full capacity of the testator, in the absence of any evidence of undue influence or fraud.

The fact that the writer of the will was himself a large beneficiary under it, over and above the portions bequeathed to the near relatives of the testator, is not singly of itself sufficient to found a presumption of fraud or undue influence; but it is a circumstance which requires the Court to look narrowly to the evidence.

In such a case the *onus* is upon the contestant to show affirmatively the undue influence or suspicious conduct on the part of the proponent.

Loose declarations or conversations attributed to the testator, to be received with caution, if not distrust.

The judgment of the Court was delivered by Justice ROBERTSON as follows:

This cause comes before the full Court on appeal from the judgment of Justice Robertson, at Chambers, admitting the will propounded to probate.

The will presented was made on the 20th day of October, 1858, three years previous to the death of the testator, which took place under melancholy circumstances in the month of November, 1861.

After careful consideration of the evidence laid before us, we are satisfied that the will was duly executed by Mr. Ely, at a time when he was of sound mind and disposing memory, and that he declared it, or signified it to be his will, in the presence of the subscribing witnesses, and we deem it unnecessary to review the objections raised by counsel for the contestant touching these points.

But on behalf of the contestant, who is the only surviving child and heir at law of Mr. Ely, a further ground of objection to the validity of the will has been raised, namely: That as it is in proof that the testator, who was an illiterate man, was in-

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capable of reading the will himself, it is incumbent on the proponent to prove that the will was read over to him by some other person, before the Court can be judicially satisfied that the testator fully understood the contents of the instrument; and that this precaution is rendered more than usually imperative, in this case, from the fact that the proponent, who is a beneficiary to a comparatively large amount under the will, wrote the instrument himself. Indeed, it has been argued by counsel that the peculiar terms of the will and the circumstances under which it was prepared and executed, show that the proponent abused the testator's confidence, with a view to his own aggrandizement.

The document offered for probate reads as follows :

"In the name of God, Amen : I, John Ely, of Kahua, in the District of Hilo, Island of Hawaii, Hawaiian Islands, being of sound mind and memory, do make, publish, and declare, this my last will and testament, in manner following, that is to say :

"*First.*—I give and bequeath to my wife, Naipu, the sum of five hundred dollars, as also I give and devise to her all that real estate belonging to me, and known as Kahua, together with all the hereditaments and appurtenances thereunto belonging, or in any wise appertaining : to be used and enjoyed by her during the term of her natural life ; and from and immediately after her decease, I give and devise the same to my son, Daniel Ely, his heirs and assigns, forever. And in addition to the above, I give and bequeath my wife, Naipu, all the furniture of the house upon said land as it now is, or may be at my decease, together with my horse and four head of cattle.

"*Second.*—I give and bequeath to my son, Daniel Ely, the sum of one thousand five hundred dollars, together with all debts or moneys due me from Hawaiian natives, and all moneys due me from John Nomore, and William Burk, and John Avery Simmons ; as also I give and devise to said son, Daniel Ely, aforesaid, his heirs and assigns, all that tract or parcel of land situate on Kulaimanu, in the District of Hilo, belonging to me, together with all the hereditaments and appurtenances thereunto belonging, or in any wise appertaining, to have and hold the same to the said Daniel Ely, his heirs and assigns forever.

"*Third.*—I give and bequeath to my nieces, Miss Mary

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Hughes (daughter of my dear departed sister, Ellen Hughes, of North Wales, Great Britain,) and her sister (name to me unknown,) the sum of two thousand dollars each.

"*Fourth.*—I give and bequeath to my friend Benjamin Pitman, of Piihonua, Hilo, Hawaii, the sum of one thousand dollars. *And lastly.*—I give and bequeath all the rest, residue and remainder, of my personal estate, of what nature or kind soever (after paying the several legacies, and all funeral expenses, debts, dues and demands against me,) to Benjamin Pitman, of Piihonua, Hilo, Hawaii, whom I hereby appoint my executor of this my last will and testament—hereby revoking all former wills by me made.

"In witness whereof, I have hereunto set my hand and seal this, the twentieth day of October, in the year of our Lord one thousand eight hundred and fifty-eight.

(L. S.)

JOHN ELY."

The foregoing instrument was at the date thereof declared to us by John Ely, the testator therein mentioned, to be his last will and testament; and he at the same time acknowledged to us, and each of us, that he had signed and sealed the same; and we thereupon, at his request, and in his presence, and in the presence of each other, signed our names thereto as attesting witnesses.

GEORGE E. TUCKER.

DON JOSEF SAIVIC.

Lo.

GILBERT WALLER.

As a general rule, the will of a person *sui juris*, which is proved to have been executed and attested with sufficient formality to meet the requirements of the law, and to have been made at a time when the testator was a free agent, and possessed of a sufficient mental capacity to make a valid disposition of his property, will be admitted to probate, as a matter of course. The proponent having made proof to the satisfaction of the Court to this extent, has done all that can be required of him, unless the party contestant is enabled to point to some peculiar or unusual circumstances in the case, which render it necessary for the Court to seek for further proof that the testator knew and understood the contents of the will, and intended to dispose of his property in the manner set out in the instrument.

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On behalf of the contestant in the present case, it is said there are two facts here which call for the exercise of extraordinary vigilance on the part of the Court, and which ought to be held to constitute of themselves, a conclusive objection to the will being pronounced valid, unless satisfactorily overcome. First, it appears that the testator, who was a Welshman by birth, was unable to read the will himself, and it is not expressly proven to have been read to him ; and, secondly, the proponent, who is also the executor named in the will, is a beneficiary to a considerable amount. This two-fold objection will be most conveniently examined, by reversing the order in which it has been stated, because if it should appear that the large bequest to the proponent was a consequence of anything having the appearance of undue influence, or of conduct calculated to excite any suspicion of fraud, that circumstance would enhance the force of the first part of the objection ; but if the contrary should appear clear in the estimation of the Court, then the first branch of the objection would be entitled to comparatively little weight.

So far as we can gather from the testimony, Mr. Ely was by no means a weak-minded man. Sober, steady, and parsimonious, and possessed, although illiterate, of a sufficient degree of business intelligence to have acquired and preserved a considerable amount of property, which he well understood how to take care of, he was not at all a person likely to be easily coaxed or frightened into making an involuntary disposition of his worldly goods. A short time previous to the execution of the document now before the Court, he had been taken ill, and Dr. Saivic, an Austrian physican, was sent for to attend him. Fearing, apparently, that his illness might terminate fatally, he dispatched his son Daniel to the village of Hilo, a distance of ten miles, with a message for Mr. Pitman to come to him, but without stating for what purpose. The roads were in bad condition, and a delay of two days occurred, as Mr. Pitman had to go to Kahua by sea. When he arrived, Dr. Saivic says the testator was gaining strength—was a good deal better. After a private interview with Mr. Ely, Mr. Pitman inquired of the physician, if the testator was, in his opinion, in a fit condition to make his will, to which the doctor replied in the affirmative. Mr. Pit-

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man then said that Mr. Ely desired every one, except himself, to leave the room, as he was about to make his will. In about an hour afterwards, Mr. Pitman came out from the bed-room and asked Dr. Saivic to be a witness to the will, and sent also for Messrs. Tucker and Waller, for the same purpose. When the witnesses entered the bed-room where the testator was lying, they saw there a small table with pens and ink upon it. Mr. Pitman took up from the table the will, which had just been written and was not folded, and informed the witnesses that they had been sent for to attest Mr. Ely's will. Mr. Ely said, "Yes, yes, my will," in his usual quick way. Mr. Pitman then, according to the recollection of the witnesses Tucker and Waller, said he would read the will if Mr. Ely desired it, but he said, "No, no." Mr. Pitman then said to the witnesses that it was not necessary for them to know the contents of the will—they could attest the signature of the testator, and that would do. He then read over the certificate of attestation, and the will was signed by Mr. Ely, and by the four witnesses in his presence. Dr. Saivic testifies that Mr. Ely signified his assent to the will, when Mr. Pitman read the certificate of attestation, but that Mr. Pitman did not offer to read the will itself. The testator's wife, and his son, the contestant, were in or about the house at the time.

These, then, are the circumstances under which this will was executed; and where, it may be asked, is the evidence of undue influence, or of suspicious conduct, on the part of the proponent? The onus is upon the contestant to show it affirmatively. There is no evidence of a sudden change in the testator's intentions respecting his property, or of a variation from instructions. The proponent did not, when he heard of Mr. Ely's sickness, rush to his bedside and importune him to leave him his property. This is not the case of a mentally weak man overcome by superstitious fears, or by the coercion of a controlling mind. The proponent did not carry with him a will ready prepared, to impose it on the sick man, for it does not appear that he was aware, until he reached Kahua, that the testator desired to make his will. It is in vain to argue that, because the will bequeaths a larger amount of property to the testator's intimate friend, Mr. Pitman, than to his son Daniel,

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that therefore undue influence must have been used, unless the Court must assume that any man, however respectable his character, will abuse the confidence of a friend who relies upon him, whenever the opportunity is offered. That a testator should prefer others to his own children is no new thing. It is only a circumstance, in any case, which requires the Court to look narrowly to the evidence. To quote the language of Mr. Surrogate Bradford, of New York, in the case of *Weir vs. Fitzgerald*, 2 Bradford's Rep., p. 67, "Kind offices and faithful services, in ordinary course, tend to influence the mind in favor of the party thus acting; and care should be taken not to confound the natural action of the human feelings in this respect, with positive dictation and control exercised over the mind of the testator." The application of this language is emphatically just in the present case.

But there is no express proof that the will was read to the testator, and therefore, says the contestant, it does not appear, affirmatively, that he knew its contents. There can be no question that, in any case like the present, it is extremely desirable and most satisfactory to have such proof, as the best evidence of a knowledge of contents, but there is no conclusion of law which renders that particular mode of proof a *sine qua non*. On this point of knowledge of contents, Dr. Lushington, in *Durnell vs. Corfield*, 1 Robertson's Ecc. Rep., 51, having referred to the case of *Barry vs. Butlin*, and speaking in reference to the doctrine in that case, said: "The doctrine is, that proof of the knowledge of the contents may be given in any form; that the degree of proof depends on the circumstances of each case, that in perfect capacity knowledge of contents may be presumed, but that when the capacity is weakened, and the benefit to the drawer of the will is large, the presumption is weaker, the suspicion is stronger; the proof must be more stringent, and the Court must be satisfied of the knowledge of the contents beyond the proof of execution by the testator." (1 Jarman on Wills, 44). Mr. Baron Parke, in delivering the judgment of the Appellate Court, in the case of *Barry vs. Butlin*, in the course of his remarks said: "If, by these expressions the learned Judge (Sir John Nicholl) meant merely to say, that there are cases of wills, prepared by a legatee, so

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pregnant with suspicion that they ought to be pronounced against in the absence of evidence in support of them, and that extending to clear proof of the actual knowledge of the contents by the supposed testator ; and that instructions proceeding from him, or the reading of the instrument by or to him, are the most satisfactory evidence of such knowledge, we fully concur in the proposition so understood ; in all probability the learned Judge intended no more than this. But if the words used are to be construed *strictly* ; if it is intended to be stated as a rule of law, that in every case in which the party preparing the will derives a benefit under it, the *onus probandi* is shifted, and that not only a certain measure, but a particular species of proof is therefore required from the party propounding the will, we feel bound to say that we conceive the doctrine to be incorrect. The strict meaning of the term *onus probandi* is this, that if no evidence is given by the party on whom the burthen is cast, the issue must be found against him. In all cases this *onus* is imposed on the party propounding a will ; it is in general discharged by proof of capacity and the fact of execution ; from which the knowledge of and assent to the contents of the instrument are assumed." "All that can be truly said is, that if a person, whether attorney or not, prepares a will with a legacy to himself, it is at most a suspicious circumstance, of more or less weight, according to the facts of each particular case ; in some of no weight at all." (1 Jarman on Wills, 45, note.) According to the doctrine recognized by these eminent authorities, the proponent in the case before us, having made proof of the due execution of the will and the full capacity of the testator, might, in the absence of any evidence of undue influence or fraud, be fairly considered to have discharged the *onus*, which the law casts upon him. But the proof on the part of the proponent goes beyond this. Two of the subscribing witnesses, Messrs. Tucker and Waller, testify that Mr. Pitman offered to read the will in their presence, if desired by the testator, and that he prevented it. True, the testimony of Dr. Saivic is in conflict with that of the others on this point. But there are the observation and recollection of two against those of one, all being equally intelligent and disinterested. And if

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Messrs. Tucker and Waller are correct in their remembrance, then the Court would be warranted in presuming conclusively, that the will had previously been read to the testator—that he well knew its contents, and, as all the testimony renders probable, desired to conceal them from his own family and others. It is in vain to argue that a designing beneficiary might have read the will falsely to the testator, or persuaded him to decline having it read before the witnesses, unless we are bound to believe that virtue and probity have forsaken the earth, or that every man should be esteemed a villain until he shall have proved the reverse. If the recollection of Messrs. Tucker and Waller is to be relied on, then Mr. Pitman was justified in not reading the will in presence of strangers without the testator's assent.

There is another point connected with this part of the case, which was forcibly put by counsel for the proponent, and is, in our opinion, of considerable weight. It is argued that the instrument itself bears intrinsic evidence of having been framed under the immediate dictation of the testator. Else, it is asked, whence the large bequest to his two nieces, in Wales, couched in the peculiar language in which it stands? It cannot be denied that this clause of the will does carry on its face the stamp of honesty and the impress of the testator's own mind, his memory having called up those near and dear to him through a long space of time, to be favorably remembered, now that he was about to make a final disposition of his property. It is incredible that a party whose first object was to aggrandize himself, should have committed the egregious error of inserting so large a bequest to parties occupying only the relation of nieces, and living at so great a distance, when the same amount added to the bequest in favor of Daniel Ely, would have had so clear a tendency to answer the argument so strongly urged against the validity of the will, that its provisions are inconsistent with the natural affection of a father towards his son.

As indicative of the will having been drawn as the instructions fell from the testator's lips, we may notice also, the precise enumeration of the animals bequeathed to his wife; the specific statement of the names of certain persons who owed him sums of money; the bequest of the land at Kulaimanu to Daniel, and

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the occurrence of a specific legacy to Mr. Pitman, before the residuary bequest. It has been argued that Mr. Pitman must have known, when he wrote the will, that Mr. Ely's title in Kulaimanu was worth little or nothing, and that the bequest of it to Daniel was of no value. But it is clear that Mr. Ely always had enjoyed certain rights there, and Daniel himself has lived on that land, under his father. The testator's estimate of his title appears from the fact that he thought himself in a position to obtain a Royal Patent, on commutation, long after the will was made. He must have thought, therefore, that the bequest of the land to Daniel was valuable.

Great stress has been laid upon certain testimony given by the contestant and Mr. Metcalf, which it is argued, tends to prove that the testator did not know the contents of this instrument. The contestant states that one night shortly after the execution of the will, he overheard a conversation between his father and mother in bed, when the former told the latter that he had left her in his will, some money, and the homestead at Kahua; that he had bequeathed to Daniel some money, and the land at Kulaimanu, which, Daniel says, he thought was his own; mentioned also the debts due to him by natives and others, which he said he had given to Daniel; said he had not bequeathed anything to his relatives in Wales, and that he had left the money lying at interest in Mr. Pitman's hands entirely undisposed of, because he might live a considerable time yet and need money for himself, and that specific money would go to somebody after he died.

Now this is a very singular conversation, if correctly reported by the contestant. So far as the testator's statement to his wife goes, it accords with the instrument, except as to the legacy in favor of the two nieces. And it is worthy of remark that he did not reveal the precise amount of money he had given to his wife, or to his son. He did not say that they were to have all his property between them. If that had been his desire, why should he have made a will at all? There would have been no propriety in his doing so, unless he had desired to take away from the share to which Daniel would have been entitled by the statute, and increase the share of his wife, a supposition which, in view of the testimony touching their domestic rela-

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tions, would be ridiculous on its face. The reason, too, which he assigned for not having disposed of the funds in Mr. Pitman's hands, shows that he merely wished to meet the prying curiosity of Naipu in such a way as would not excite the jealousy and anger she and Daniel would naturally have felt if they had been informed of the real state of the matter. He knew that Naipu was sufficiently ignorant to be imposed on by the idea that if he had disposed of the funds in Mr. Pitman's hands by will, he could not have used any of them afterwards himself; but that Mr. Ely was not so ignorant on the subject as to believe this, is abundantly proven. Again, it may be asked: Can it be believed, in the absence of any apparent cause for such a strange course, that having set about making a testamentary disposition of his estate, he would have left one-half of it unappropriated? The desire of concealment is patent throughout, else why did not the testator invite his son to be present at the preparation of his will? After it was executed, why did he not retain it among his other papers, or place it in the keeping of Daniel, who attended to business for him the last few years of his life? These are pregnant facts to show his wish to conceal the contents from his wife and son.

We deem it unnecessary to refer at length to the conversation which Mr. Metcalf testifies to having had with the testator, after Mr. Pitman had left the Kingdom. We could not have drawn the same inferences from what the testator said that the witness drew. Any weight that might otherwise have been attached to the remarks then made by Mr. Ely, is much detracted from by the way in which they were induced. The following language of Mr. Surrogate Bradford may be cited with propriety in noticing that part of the argument based upon the testator's declarations, as reported by the contestant and Mr. Metcalf: "I know very well how much conversations of this kind are to be distrusted. From motives of policy, for the sake of peace, to secure kindly attention, or from other motives often operating upon the human mind, especially in the case of an artful or wary man; or again, in an unguarded moment, in a spirit of exasperation, or boasting, or threatening, loose declarations are frequently made of testamentary dispositions, contemplated or executed, which are not in harmony with the truth."

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(Allen vs. the Public Administrator, 1 Bradford's Rep., p. 392.)

There is one incident disclosed by the testimony, which tells strongly in favor of the proponent's good faith, and is worthy of particular notice. About five months previous to the murder of Mr. Ely and his wife, Mr. Pitman left Hilo for Honolulu, on his way to the United States. Before leaving, he placed the will in the keeping of the Rev. Titus Coan, at Hilo, with instructions to deliver it to Mr. Ely if he should call for it. Mr. Ely was informed of the place where the will was deposited, both by Mr. Pitman and Mr. Coan. Now if the instrument had been fraudulently concocted, or if it had contained bequests which the testator never intended, why should the proponent have run the needless and imminent risk of discovery by leaving it behind, when he could as easily have carried it with him? Judging from the testimony, he might have anticipated that the matter would be stirred up after he had gone, either from curiosity or some other motive.

Having thoroughly weighed the voluminous evidence before us, we have no hesitation in saying that, to our apprehension, the instrument presented for probate makes very much such a disposition of the testator's property as it was probable he would make under the circumstances in which he was placed. Keeping in view various facts connected with his domestic relations, affecting both his wife and son, it was not probable, we think, that he would bestow upon either of them a large share of his property. The liberal provision for his nieces is in accordance with the fact that, about three months previously, he had forwarded to Miss Mary Hughes the sum of five hundred dollars, showing that the children of his beloved sister were affectionately remembered by him; and having set apart for the several persons who had claims upon his bounty by relationship the amounts which he considered just, there remained no one upon whom he was so likely to bestow the residue of his estate as Mr. Pitman, his intimate and trusted friend of many years standing, at whose departure from Hawaii he shed tears of genuine grief.

At the hearing before the full Court, counsel for the contestant was understood to say that he did not mean to charge the proponent directly with having fraudulently framed this instru-

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ment, contrary to the wishes of the testator, although some parts of his argument conveyed an imputation of fraud, or the exercise of undue influence ; but that he rested the contestation mainly upon the weakness of the evidence of a knowledge of the contents by the testator. This we have always regarded as the turning point in the cause. Sitting here as a Court of Probate, it is our province to pass upon the facts, as well as upon the law involved ; and, putting the question to ourselves, as we would to a jury, whether or not we are satisfied, upon a consideration of all the evidence, that the testator was acquainted with the contents of this instrument, and that they conform to his real intentions, we answer, clearly, that we are satisfied, beyond a reasonable doubt, that the will before us is genuine. The judgment below is therefore affirmed.

Mr. Bates for proponent.

Mr. Harris for contestant.

March 18, 1863.

SUPREME COURT—IN BANCO.

APRIL TERM—1863.

ABENELA vs. KAILIKOLE.

THE plaintiff, in ejectment, claiming a piece of land, as the adopted son of the former owner, who died in 1848, failing to prove the legality of the adoption, according to Section 3d, Chapter 1st, Part 4th, and Article 3d, Chapter 2d, Part 5th, Statutes of 1846, judgment was entered in favor of the defendant.

The following was the decision of the full Court :

This is an action of ejectment, brought by the plaintiff, to recover possession of a piece of land, situated in Kalihi, near Honolulu, and known as the Ili of Haunapo.

By consent of the parties, the case was tried by the Court, without the intervention of a jury.

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The land in question, which has been in the possession of the defendant for a number of years, is claimed by the plaintiff, as the alleged adopted son of Kaailauhala and Laumaka, the former owners of the land.

Upon examination of the case, we deem it unnecessary to advert to any other question than that of the plaintiff's alleged adoption, as that seems under the circumstances to be decisive of the whole case.

It appears that the plaintiff, who is the son of Kapule, a brother of Kaailauhala, lived with Kaailauhala and his wife Laumaka, in Honolulu, for several years previous to their death, which occurred in the year 1848. They having no child of their own, were desirous of adopting the plaintiff. Accordingly, some of the witnesses testify in substance, that a written agreement of adoption was prepared, and signed by Kapule, Kaailauhala and Laumaka in the presence of Mr. Kaaukai, a magistrate. This agreement has not been produced, but, the weight of evidence, in our opinion, places the date of the transaction at some time during the year 1847, and after Kaailauhala had become ill of the disease which terminated his life, in the month of February, 1848.

It appears, then, that the signing of the agreement took place at a time which subjects the transaction to the provisions of the Statutes of 1846. The Act to organize the executive departments was passed on the 27th April, 1846, and promulgated on the 20th June following. Part 4th of said Act took effect on the 20th September, 1846, including the following provision touching the adoption of children, in Section 3d, Chapter 1st: "It shall be competent to parents to consent, in writing, and in presence of a judge, to the adoption of their children, by any suitable third party; but, in that case, the terms of the adoption must be definitively stipulated in the agreement, and must not be a beneficial consideration to the parents, but to the child, satisfactory to the judicial officer acknowledging the adoption. All such acts of adoption shall be recorded by a Notary Public, as in and by the Fifth Part of this Act provided." Upon turning to Chapter 2d, Article 3d, of Part Fifth, of said Act, which took effect on the 20th of August, 1846, we find the following provision:

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"SECTION 12. It shall be incumbent on all adopters of children, pursuant to the fourth part of this Act, within thirty days after such adoption, to transmit the written act and terms of such adoption, attested by some judicial officer of the Kingdom, to the said principal Notary Public, at Honolulu, to be by him enregistered at the expense of the adopter—in default of which such act of adoption shall be void and of no effect."

The Legislature having made it necessary, and we think wisely so, that all agreements of adoption which are of great importance, as affecting rights in property, should be made in writing, and duly recorded; and as no compliance with this requirement has been shown in the present case, the plaintiff cannot prevail in this action, in the absence of the necessary legal evidence of his having been adopted; as alleged, by Kaailauhala and Laumaka.

We, therefore, order that judgment be entered in favor of defendant, as of the last day of the April Term.

D. L. Gregg, for the plaintiff.

C. C. Harris, for the defendant.

SUPREME COURT—IN EQUITY.

W. JARRETT vs. P. F. MANINI.

Whether the complainant, who was in trouble and anxiety of mind, had a right to convey away his property to a trustee for the benefit of his son, depends upon the fact, whether he was in debt, which he had no means to pay, and whether done to defraud creditors.

A conveyance of property is not *ipso facto* void, though the person making it may be under a prosecution for embezzlement.

The direct mode of creating a trust, is by some writing signed by the party from whom it emanates; yet there are resulting trusts implied by law from the manifest intention of the parties, and the nature and justice of the case.

If the trust has taken effect, it cannot be defeated by a re-conveyance of the property to the party who created it.

ALLEN, C. J.

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The demurrer to the bill alleges, First : That it appears by the bill that the complainant conveyed the property to the respondent which he now seeks to recover, because he was apprehensive of a prosecution for embezzlement of money by the Hawaiian Government, and that this transfer of the property, under the circumstances alleged on the face of the bill, is against public policy and the principles of equity.

The principles of law applicable to fraudulent transfers of property have been clearly stated. A conveyance of property made with the intent to defraud creditors, is void as to them, and the grantor cannot recover back property conveyed with such a purpose. He is bound by his own fraudulent act. The question here is, whether by the terms of the bill he declares, either by implication or expressly, that he makes this conveyance to avoid or defeat his creditors.

It appears that the complainant had leased, in 1851, a large tract of land at Waianae for a term of fifty years, and had associated the respondent with him in stocking it, and to whom was entrusted the general management. It appears, further, that the parties were on intimate terms, and that the respondent had expressed his intention of adopting complainant's son, who was named Paul from regard to the complainant.

Under these circumstances, and from these considerations, he made the conveyance which he now seeks to revoke. The complainant was in trouble and anxiety of mind, and he sought to place his son in a condition of independence. Whether he had a right to do this, by conveying this property, depends upon the fact whether he was in debt which he had no means to pay, and whether it was done for the purpose of defrauding his creditors. It is not a legal sequence because a person is under arrest even for embezzlement, that a conveyance of property is void. It is not void, *ipso facto* ; and therefore this cause of the demurrer is overruled.

It is proper in this connection to notice that the defendant, on the 22d day of December, 1859, executed a deed, conveying to the plaintiff, as trustee of his said son, Paul, all the rents accruing from certain real estate in Honolulu, being moved thereto by good and just consideration of affection towards his adopted son, Paul Jarrett, since the year 1851. It is explicitly

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declared in said conveyance that the rents accruing from said property should be used for the purpose of maintaining and educating his adopted son. This is not in terms an admission of the trust, as set forth in the bill, but it is an evidence of an affectionate regard for the son of the plaintiff, and to some extent, it carries out the purpose declared in the bill, that the plaintiff's conveyance was in trust for his son.

Justice Story says "that a trust is not under all circumstances absolute, for if the trust is purely voluntary, and without any consideration, and the beneficiary has not become a party to it by his express assent after notice of it, it is revocable, and if revoked, then the original trust is gone, and an implied trust results in favor of the party who originally created it." According to the terms of the bill, the trust is created, and the *cestui que trust* is an infant, and therefore his dissent would have no legal effect, and hence no revocation could be effected by an act of the infant. In this case the plaintiff certainly has no right to revoke the trust, from the relation which the defendant bears to it. As an illustration, the defendant adopts the child, and receives the property in trust for his benefit; he then has rights and duties as trustee. It is true, as alleged in the third cause of demurrer, that the said property was conveyed to the defendant for the use and benefit of the plaintiff's son, and that as he has not any further interest in the property, he is not a proper party to the bill. It is further agreed in the bill, that the defendant agreed to account to the plaintiff for all the proceeds and profits of said land during the minority of the plaintiff's son, and which were to be devoted to his benefit. It is manifest, then, that he has a duty and interest in the matter; and if the proofs sustain the allegations in the bill, he has a right to an account of the proceeds and profits of the estate conveyed. It is equally clear that a re-conveyance of the property to the plaintiff would be in direct conflict to the terms of the trust as alleged in the bill—for it is expressly set forth that the profits arising from the property are to be for the benefit and use of the son during his minority, and the title to become complete on his becoming of legal age. To this extent the demurrer is good, that the prayer of the plaintiff is not fully in conformity with the allegations of the bill, for if a trust is sus-

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tained, a re-conveyance of the property cannot be made to the party who created it. If the trust has taken effect, he cannot defeat it. This does not go to defeat the bill, but to that portion of the prayer.

It is further assigned as a cause of demurrer, that as the alleged agreement for the adoption of the plaintiff's son, and the appropriation of the property to his use until he became of age, when he should be entitled to its use and control entirely, is not in writing, and is in contradiction to the terms of the deed from the plaintiff, and is therefore void in law.

The English statute of frauds requires the declaration or creation of trusts of lands to be manifested and proved by some writing signed by the party creating the trust; and it is contended by the defendant that as the trust alleged in the bill is not evidenced by writing, it is in derogation of law, and void. While there is the direct mode of creating a trust, there are resulting trusts implied by law from the manifest intention of the parties, and the nature and justice of the case. Hill, in his treatise on Trustees, says that trusts of this character are better described as constructive trusts, than as trusts by operation of law. Such trusts are expressly excepted from the operation of the statute of frauds. It is alleged that the defendant holds the property in trust for Paul, the son of the plaintiff. There is no declaration of trust in writing, and if any trust exists, it is an implied, or resulting trust. It is an admitted principle of law, that if one purchases an estate in the name of another, a trust results to him who advances the purchase money, and parol evidence is admissible to show the payment, although in contradiction to the deed. Justice Woodbury says "that a mortgage when an absolute deed exists, may be shown in chancery by proving by parol, the relation of debtor and creditor between the parties, or the recognition in other ways that the transaction was a mere security for a loan." (*Tufts vs. Tufts, et al.*, 3 Woodbury & Minot, p. 462.) So, if an agent uses the money of the principal to purchase land with, and he takes the deed in his own name, a resulting trust would arise in law in favor of the principal, not prohibited by the statute of frauds, and independent of its provisions. (Hill on Trustees, 55; 2 Story's Eq. Juris., Secs. 1201-6.) A trust is implied when a

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conveyance is made of land without any consideration or declaration of the uses. Chancellor Kent says "that a Court of Equity will regard and enforce trusts in a variety of other cases, when substantial justice and the rights of third persons are essentially concerned. If a trust is created for the benefit of a third person, without his knowledge, he may, when he has notice of it, affirm the trust, and call on the Court to enforce the performance of it."

In *Boyd vs. McLean*, 1 Johns. Rep., p. 582, it was held that a resulting trust might be established by parol proof, not only against the face of the deed itself, but in opposition to the answer of the nominal purchaser denying the trust, and even after the death of such purchaser. In the case of *Jenkins vs. Eldridge*, 3 Story's Rep., p. 181, it appeared that the defendant, upon a conveyance of lands to him in fee upon a private trust, promised to reduce the agreement to writing and to keep it as a private memorandum, to be found among his papers in case of his death, in order to secure the rights of the *cestui que trust*, but afterwards refused so to do, and this was held sufficient to take the case out of the statute. In the same case, the Court say, "that a Court of Equity will enforce a parol trust resulting from agency and resting upon honorary obligations"—"and that the statute of frauds is never allowed as a protection to frauds, or as a means of seducing the unwary into false confidence to their injury." Chancellor Kent, in his Commentaries, vol. 4, p. 143, says: "A deed absolute on the face of it, and though registered as a deed, will be valid and effectual as a mortgage as between the parties, if it was intended by them to be merely a security for a debt. And this would be the case, though the defeasance was by an agreement resting in parol; for parol evidence is admissible to show that an absolute deed was intended as a mortgage, and that the defeasance had been omitted or destroyed by fraud or mistake." In the case of *Taylor vs. Little*, 2 Sum. Rep., p. 228, 232, 233, he says that "it is the same, if it be omitted by design, upon mutual confidence between the parties; for the violation of such an agreement would be a fraud of the most flagrant kind, originating in an open breach of trust against conscience and justice." And this is fully supported by the case of *Morris vs. Nixon*,

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1 How. Rep., 118. In the case of *Sturges et al, vs. Cary et al*, 2 Curtis Rep., p. 382, Justice Curtis says "that a deed, absolute in form, may be shown to have been really a mortgage by the oral testimony of two witnesses against the denials of the answer, where these denials are not satisfactory in themselves, and are accompanied with admission that some confidential relations existed between the parties, not consistent with the terms of the deed."

Regarding the joint intentions of the parties to the stock on the land, and their friendly relations, and the assurance of the defendant to adopt the plaintiff's only son, and who was regarded, in fact, as an adopted son and heir, and who has been recognized as such since 1851, as appears by a deed from the defendant to the plaintiff, before referred to, it presents a strong case, under the principles as laid down by the most eminent jurists, for the interposition of a Court of Equity.

Mr. Montgomery and Mr. Harris, for plaintiff.

Mr. Bates and Mr. Davis, for defendant.

SUPREME COURT—IN EQUITY.

PAUL F. JARRETT, BY HIS FATHER AND NEXT FRIEND, WILLIAM JARRETT, vs. PAUL MANINI.

A TRUST was alleged in the complainant's bill, not evidenced by any writing, in opposition to an absolute deed, conveying the estate of the *cestui que trust* to the respondent; the deed stated to have been given without consideration: Held, that if the estate was conveyed to the nominal grantee, as a gift to the *cestui que trust*, it is the same in principle as if paid for by his own money, and must be regarded as a trust, *resulting from the original transaction*, which may be established by parol proof against the answer of the grantee denying it; but such proof must be of the most conclusive character.

ALLEN, C. J.

This is a bill in equity, in which it is alleged that, in the early part of 1850, the complainant's father concluded an

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agreement for a lease of a tract of grazing land called Lualualei, situated at Waianae, Oahu, containing about seven thousand acres, for the term of fifty years, at an annual rent of seven hundred dollars, and entered into possession of same, although the lease was not duly executed till the 1st day of August, 1851.

The complainant's father associated himself with the respondent for the purpose of carrying on a cattle farm on said tract of land on joint account, it being understood that the respondent should reside on the estate as the active managing partner, and the complainant should transact all the business connected with the estate at Honolulu; but there was no contract or agreement entered into in writing. Whereupon the parties purchased some cattle and stock for said land by their joint funds; and complainant avers that his father provided cattle, horses and sheep from his private estate, which were placed on the land aforesaid, which became part of the capital stock thereof, and that he advanced money and procured stock and property to an amount larger than the respondent.

It is further alleged that the complainant's father had been on terms of intimacy and friendship with the respondent, who was then childless, and who had agreed to adopt and provide for the complainant's then an only son, who had been named Paul in compliment to the respondent, and who was regarded and treated as his adopted son and heir, and destined to inherit the said property; and that in the early part of October, 1851, the complainant's father being in trouble and distress, on account of a threatened prosecution, conveyed all his interest in said land, and other partnership property, to the respondent; that the compensation of one thousand dollars, as stated in the deed, was not in fact paid, and that the words "sundry other considerations," were meant to be the adoption of the said complainant by the respondent, and providing for him from said estate; and it was understood and agreed that the said defendant, on receiving the said transfer, should formally adopt your orator, and that the proceeds and profits accruing from the said estate should thenceforth be for his benefit until he should arrive at the age of maturity, when he should be entitled to one-half of all the said property—and that in the meantime, and during his minority, the defendant should fully and faith-

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fully account with his father for all the proceeds and profits of the said land and stock.

The complainant's father often applied to the respondent to execute a document expressive of the agreement, which he from time to time postponed, although he never disowned or denied the interest of the complainant's father in said property, and said that there was no occasion for any uneasiness on his part on the subject. That the said respondent, not taking any steps for the legal adoption of the complainant, and the complainant's father having been extricated from his difficulties, called on the respondent on the 10th February, 1853, to cancel the deed and reconvey the property, so as to reinvest the property, when the respondent replied that the deed was destroyed some time ago ; and from that time, at short intervals, the complainant's father has called upon respondent to perfect the adoption, and account for the proceeds of the property, or reconvey the property, and more especially did he call upon him by letter, in 1857 and 1858, but no answer in writing was made ; but he assured complainant's father that it was all right, and that he was foolish to harrass himself on the subject. It is further alleged that, on or about the 22d December, 1859, the respondent executed a deed making over to the complainant's father, in trust for him, all the rents accruing from a certain tenement in Honolulu, being moved thereto by good and just considerations of affection towards his adopted son, Paul F. Jarrett, since the year 1851, but he refused to acknowledge the same before the proper officer, in order that it might be recorded, wherefore it became necessary to have it recorded by the mode as prescribed by law for such cases. It is further alleged that the respondent has lately refused to render any account, and denies all right of the complainant's father to demand the same in behalf of the complainant, and repudiates all claim or interest of the complainant in the estate of Lualualei, and asserts it to be his own individual property.

Whereupon, the complainant prays that the respondent may be summoned to appear and answer this bill, and that he may be ordered to file a full and true account of said estate, of the receipts, profits and emoluments thereof, and of the stock on said estate, now and formerly, and that an account may be taken

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by a Master in Chancery of the receipts and disbursements of the parties, and that the respondent may be ordered to pay the moiety thereof, with the costs of this suit.

The respondent answers and says, that the father of the complainant did obtain a lease of Lualualei, which bears date August 1st, 1851, but that he had prior to that time negotiated for a lease of the same land at five hundred dollars per annum, and had employed one Turner to survey the same, and that he had paid him for his services, he having completed the survey in January, 1851 ; and that prior to the 1st August next ensuing, the respondent had put upon the land two herds of cattle, one herd of one hundred head, and had secured a herd of two hundred and thirty head, purchased by him of the late Stephen Reynolds, as guardian of the children of John C. Jones ; and he further alleges that the complainant's father took the lease to himself, although acting as agent for respondent, and, therefore, took and held the lease in trust for his use and benefit.

The respondent admits the agreement by which he and complainant's father were to associate themselves together for carrying on a cattle farm on joint account, each of the parties to furnish his proportion of stock.

The respondent denies that any cattle were furnished by joint funds, or that the complainant's father furnished any stock from his private estate ; but he avers that the cattle were provided and placed on the said land by himself, and purchased with his own funds, in the expectation that the said complainant's father would reimburse him for one-half of the outlay. He admits that the complainant's father did put on a few horses and sheep, which he subsequently took away and converted to his own use, and denies that the complainant's father ever advanced money or procured stock and property to an amount greater than himself, as is alleged in complainant's bill, in any form whatever.

The respondent admits that a friendship had existed between himself and complainant's father for many years, and that he had named his son " Paul " in compliment to him, the respondent, and that he had intended to adopt him, but it was defeated by the act of the complainant's father. The respondent admits that the complainant did execute a deed to the respon-

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dent of his interest in Lualualei, but it was not prepared by W. A. Cooper, as is alleged in the bill. The respondent avers it to be in the handwriting of complainant's father, and acknowledged and witnessed by said Cooper.

The respondent denies that the consideration expressed in the deed of one thousand dollars was not paid by defendant, but that he did advance to complainant's father twenty-three hundred dollars, the said complainant's father promising to give to him security on his interest in several schooners at that time owned by said complainant's father, and that the said vessels, to wit: the "Kaluna," "Catherine" and "Kauikeouli," were afterwards sold, in order to satisfy certain demands and debts against complainant's father and himself.

He avers that he received the deed aforesaid in part payment of twenty-three hundred dollars advanced to him, and that the balance of twenty-three hundred is yet unpaid and now due him; and that "the sundry other considerations" mentioned in said deed were, that the respondent had agreed to pasture the horses then running on the land, and belonging to the defendant's father, free of charge, and that they did not refer to the adoption of the complainant and provisions for him—and the respondent denying that he ever promised to render any account of the proceeds or profits of said land or stock to the complainant's father or his son.

Respondent denies the trust, and avers that he never admitted any such arrangement to any one, and further, that the deed was made in good faith, and conveyed, *bona fide* and absolutely, the entire interest of the complainant's father in the estate to him. The respondent denies that he ever said to the complainant's father that "the deed was destroyed," or that he ever made the admissions imputed to him.

The respondent admits that he executed the deed of the 22d day of December, 1859, making over the rents of a certain tenement in Honolulu for the use and benefit of complainant, but that it had no connection or relation with the complainant's father's interest in the Lualualei estate, being moved thereto by affection for complainant, "who is in said deed styled as the adopted son of this defendant," although in point of fact no legal adoption of the said complainant has been made, for the reason

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that the said Paul F. Jarrett, who had been living with this defendant, was taken from the care and custody of this defendant by his parents, the said complainant's father and his wife, against the express will of this defendant, and contrary to the promise and agreement of his, the said Paul Jarrett's parents, made to and with this defendant; and this defendant asserts that he was ever willing to have thus legally adopted the said boy Paul; and he did refuse to acknowledge the deed, because the complainant's father had refused to have the adoption of his son legally perfected, as had been agreed upon by the parties.

The respondent submits that as he holds the estate under an absolute deed, for which he has paid a valuable consideration, that he should not be compelled to render an account of the receipts, profits and emoluments thereof.

The plaintiff denies that the defendant negotiated for a lease of the land of Lualualei with an agent of the King, or that he employed one Turner to survey the same and paid him for his services, and also denies that the defendant, prior to the first of August, 1851, purchased of Stephen Reynolds two herds of cattle and put them on the land; and he further denies that when the complainant's father took a lease to himself that he was acting as agent of the defendant, and took the said lease and held it in trust for the use and benefit of defendant,—and he denies that the cattle placed on said land were paid for by the defendant with his own funds, but avers the truth to be that he was unable to pay for the same. He further denies that he advanced to the complainant's father the sum of twenty-three hundred dollars for any purposes whatever, and denies that complainant's father offered to give the defendant security on some schooner or vessel, and denies that the adoption was defeated by any act of repliant's father, but by Manini himself, by misusing the complainant.

The respondent denies in his answer the trust as alleged in the bill, and he contends that at most it is a trust under a contract, and not a resulting trust; that therefore the evidence of it must be in writing, and it is admitted that there was no written declaration of trust. The doctrine of trusts has hitherto been elaborately considered by the Court, but it may be well to refer to it again in this connection. There are certain

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principles clearly admitted in relation to trusts. It is admitted, for example, that if a person purchases an estate with his own money, and takes the deed in the name of another, a trust results by implication of law to him who makes the advance, and parole proof is admitted to establish it, notwithstanding by the deed the consideration is acknowledged to have been paid by the nominal grantee. So, also, when a deed has been taken by a grantee, and the money paid by the *cestui que trust*. The doctrine laid down in the case of Peabody & Tarbell, 2 Cushing, 226, is very comprehensive. "The trust will revert to the source and origin of the consideration, whatever may be its character and nature." In this case, what was the origin of the consideration? It is admitted that the father had the title, and that he conveyed the same to the defendant, and the question arises, whether it was in trust for the benefit of his son. If parole evidence is competent to prove that the funds of a *cestui que trust* were applied to the payment of the estate, it is very evident that the same kind of evidence is competent to prove the trust, when a conveyance is made by another for his benefit. It is the same in principle. The consideration was not paid in either case. The same principle applies to the case of the payment of the money of the *cestui que trust*, or by the trustee with funds which are in equity, the funds of the *cestui que trust*. If the estate was conveyed to the nominal grantee, as a gift to the *cestui que trust*, it is the same in principle as if paid for by his own money, and it is a trust which may be established by parole proof, against the answer of the grantee denying it. The source and origin of the consideration was not from the grantee, but, from the *cestui que trust*, by his father. It is immaterial whether, it was the money of the *cestui que trust* which purchased the property, or whether it was a conveyance of property for his benefit, the consideration moving from him or from his father and not from the nominal grantee. To this extent, and for this purpose then, parole evidence is admissible. It must be borne in mind, that while it is proper to consider the relation in which the parties stand to each other, still the trust results from the original transaction, and while the complainant has laid the foundation, by the allegation in his bill, for the introduction of parole, it must be of the most conclusive character to sustain it.

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It appears that the complainant's father leased the land called Lualualei in 1850, and entered into possession, although the lease was not executed till August, 1851, and it is admitted that he formed a co-partnership with the defendant for carrying on a cattle ranch. It was agreed that the respondent should reside on the estate and superintend their business there, while the complainant's father was to take charge of their business in Honolulu. It is admitted that the partners were personal friends and that it was mutually understood and agreed that the respondent should adopt the complainant as his son and heir. Such were the relations of the parties at the time the deed of the property was made to the respondent in trust for the complainant—as he alleges. It is important to know the history of the transaction at the time of the execution of the deed—Mrs. Jarrett, the mother of the complainant testifies: that she remembers that her husband, the respondent, and William Cooper, met at her house some years ago, and Mr. Cooper brought a paper with him—on being interrogated respecting its contents, he said it was a *pa'apa'a hōclimalima*, and by it, certain property was to be divided between her husband and Manini. She testifies further, that Manini said he was to manage or *hooponopono* the property, which was to consist of horses, cattle, and sheep, and the land of Lualualei, and that the cattle were on that land. Manini said the property was to remain with him till the child became twenty-one years of age, at which time Paul F. Jarrett was to have his father's proportion, that the child was to remain during his minority with Jarrett, and that he, Manini, was to sell the cattle and divide the money with Jarrett up to the majority of the boy. Until Cooper's death Manini was in the habit of visiting witness's house. He very often brought provisions to the house, such as beef, butter, sugar, mutton, fish, bananas, and sweetmeats for the children and clothes for the child. Napehi lived with Manini at that time. Napehi had heard Manini converse about the land of Lualualei. He said Jarrett's child was to have the cattle, horses and sheep, and that they were to be divided, and that when the child became twenty-one years of age, then the division with William Jarrett was to cease, and his share belonged to the child, and that while he was in minority the

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proceeds of the property were to belong to Jarrett. Witness states the place, but does not remember the time, whether it took place before or after the time of the small pox.

Mrs. Jarrett on being recalled further testifies, that some sheep and lumber were sent to Manini, at Waianae; that Manini took the lumber from Jarrett's place in Kulaokahua, and it was designed for a dairy house; that five English and two Mexican saddles were sent to Manini, the former for his stable in Honolulu, and the latter were given to the bullock boys of Manini and Jarrett. The lumber was taken by Manini several years after the writing of the *palapala*, but the sheep, fifty-five in number, were taken before.

Mr. McCully testified that Manini gave him a note to collect, dated December 21st, 1858, signed by A. S. Nuuanu, for two hundred dollars, and he requested the witness that when it was collected, he should pay one-half to Jarrett, the three parties being present. This transpired in the fall of 1859. Manini said the note was for a boat.

Mr. Von Holt testifies that in July, 1851, the firm of Von Holt & Heuck sold a few thousand feet of lumber to Jarrett. There was some other evidence showing that he had furnished materials for the cattle ranch.

The counsel for the complainant contend that the answer of the respondent is not entitled to credit, for the reason that he had suborned a witness. It appears that Timoteo was introduced as a witness by the respondent, who testifies that he was *luna* of the land when Manini and Jarrett were partners, but that they are not partners now. He says the land is of great extent for pasturage. I first heard of the dissolution of the partnership at Mr. Jarrett's house. I had occasion to see Jarrett, because Mr. Manini said he had bought Jarrett's interest, and he came with the bullock boys and drove the cattle in, and put on his own brand. Previous to that they had a partnership brand. Witness had charge of the cattle pen at the time, and he says he came to Honolulu to see Jarrett about the brand; "and when I told him that Manini said that he had purchased the land, Jarrett replied that is right, I have nothing left, I have sold it to Manini." Witness thinks that the time was 1851. He further testifies that Jarrett was afterwards at Waianae, and he

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made substantially the same declarations to himself and wife, with the additional remark that he had sold everything to Manini, and that he had paid him twenty-three hundred dollars. About one week intervened in this conversation. He further testifies that at this time Manini drove in the cattle and branded them with his brand; never saw Jarrett there afterwards. This witness subsequently comes into Court and corrects his testimony by saying that this testimony of his conversation in regard to selling the land was false—that Jarrett and he did not talk together. He says that the respondent instructed him to make these false statements. He says the respondent wrote what he was to say, and that he committed it to memory, and that the paper was at his house, which was sent for and produced in Court. He now declares that all those statements, made at his former examination, were false, and that they were made by procurement of respondent. There was much testimony introduced in relation to the hand writing of the paper referred to, but the weight of testimony was that it was the respondent's.

This effort on the part of the respondent to influence the witness to make false statements has materially impaired the integrity of his answer. A party in a suit who will attempt to suborn a witness, will not be scrupulous about his own testimony.

The conveyance of certain premises in Honolulu by respondent to complainant's father in trust for him, designating him as his adopted son, as stated in the deed, since 1851, is a corroboration of the general declaration in the bill, so far as relates to the adoption.

The argument of the length of possession has not so much weight as it would have had, had the parties sustained independent relation in the business, especially when we take into consideration that the complainant's father had made repeated efforts for a settlement by letters, which it appears were never answered. If the complainant had no rightful claim, it is somewhat singular, although by no means conclusive, that when these letters were received, that the demand was not repudiated at once. This is the usual course upon a demand for an unjust claim.

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The joint note to the Jones's for cattle is another circumstance in corroboration of the allegation of interest as alleged in the bill.

In view of all the circumstances of the case, the Court are of opinion that the allegations in the bill are sustained, and order and decree that the respondent file under oath, a full and true account of the said estate since the commencement of the business on joint account, and of the receipts, profits and emoluments thereof, and that the same be referred to J. E. Barnard, one of the Masters in Chancery of this Court, to state an account of all transactions between the parties in connection with the said estate, with the usual powers given to the Master on such occasions to examine either party on oath, and to require the production of the partnership books, and all documents and vouchers in the possession of either party touching the premises.

J. Montgomery and C. C. Harris for plaintiff.

A. B. Bates and R. G. Davis for defendant.

May 4, 1863.

SUPREME COURT.

JOHN MONTGOMERY vs. DANIEL MONTGOMERY.

As THE profession of the law is practiced in the Courts of this Kingdom, the same person often performing the duties of attorney and advocate, a reasonable compensation for services rendered should be awarded.

The withdrawal of a counsel, during the progress of the cause, by mutual accord, does not justify the client in refusing to pay the retainer.

An agent, holding himself out as a principal, incurs the liability to the same extent as if he was principal.

ALLEN, C. J.

This is an action of assumpsit, for work, labor and professional services as attorney, solicitor and counsellor at law; and the plaintiff, *pro se*, and the defendant by his counsellor, have submitted the case to the decision of the Court, without the intervention of a jury.

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The bill of particulars sets forth certain services rendered by the plaintiff for the defendant before the Police Court, all which were proved, and the amounts charged are regarded as reasonable ; but it is contended that these services were performed for the Puuloa estate, and therefore the defendant, acting as agent, is not liable. It is in evidence that there has been a decree of the Court ordering the defendant to re-convey the estate and render an account, as it was adjudged that he was the agent. It further appears that during the period in which the services were rendered, the defendant held himself out as the owner of the estate, and did not make known that he was acting in the capacity of an agent.

The rule of law is very clear, that when one employs another to perform services for himself, and does not make known that he is acting for another, he incurs a liability for the service. From all the evidence in the case, it is very clear that the defendant employed the plaintiff on his own account, claiming, as he did, the whole estate. That he did not succeed in retaining it, is no legal reason that he should be exonerated from liability for service which he had employed. If a man is in fact agent, but conceals the fact, and holds himself out as principal, he incurs the liability to the same extent as if he was principal. The credit is given to him, and although he may have deceived the person with whom he was negotiating, by representing himself as owner of an estate, and thereby enhancing his credit, it furnishes no good reason for exonerating him from the liability. A man must be held to the responsibility which he assumes. In this case, it is very clear that the defendant assumed that of principal, and therefore he must fulfill it.

The next charge is as follows :

"To my retainer to act for you in the defense of the bill in chancery, alleging that you were trustee for plaintiff in the Puuloa estate, and praying a decree to that effect, and delivering of possession of the estate to the plaintiff, and attendance on you in that capacity for several months in preparing materials for your defense, and in preparing draft of your answer, and for fair copy for the perusal of my associate counsel, and discussing the case with them, and afterwards engrossing answer to be signed, sworn and filed, and also in taking testimony, in all

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which I devoted a very unusual amount of time and labor to you and the case, both in and out of the ordinary hours of business, and as well in my office as at my private residence, \$250."

The testimony is very conclusive in relation to the amount of service rendered, which is admitted by the counsel for the defense ; but it is contended that he is not entitled to recover, because he abandoned the case. This is a sound legal position, unless he did so for a good and valid reason. It appears from the evidence that a difference of opinion among the counsel for the defense had arisen, in relation to the management of the case, on some point which each regarded as essential. The plaintiff was associated with Mr. Bates and Mr. Davis in the management of the case, and each expressed a desire to retire, and the question was submitted to the defendant for his decision as to the manner of conducting the cause in a certain particular, and he gave his decision in favor of the mode prescribed by Mr. Bates, whereupon Mr. Montgomery withdrew. As the case then stood, he was justified in withdrawing. The party had made his own preference of counsel, and it is not pretended that Mr. Montgomery withdrew leaving the defendant without intelligent counsel, who was well versed in the law and facts of the case. But it is contended further, that having abandoned the case before the termination of the suit, he is not entitled to recover a retainer. This would be true if he was not justified in his professional conduct ; but in this instance he withdrew by mutual accord, and this being the case he would be entitled to the value of services already rendered, unless he had relinquished them. The most difficult question is, whether the charge for a retainer is a proper cause of action. The English authorities are clearly against it. The Lord Chief Justice, in the case of *Kennedy vs. Brown*, has recently made a decision that "a promise by a client to pay money to a counsel for his advocacy, whether made before, or during, or after the litigation, has no binding effect, and that the relation of counsel and client renders the parties mutually incapable of making any legal contract of hiring and service concerning advocacy in litigation."

The division of labor by the members of the legal profession

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in the English Courts is unknown here. There the Attorney has the duty of the preparation of the case, etc.; preparing the pleadings, examining and arranging the testimony; in fine, he prepares the case for trial. It is then submitted to the Barrister for advocacy. Here the same person often performs the whole service, from filing the declaration to final judgment, embracing all the duties of Attorney and advocate; and we can see no reason why he should not have a reasonable compensation for services rendered. The Court would undoubtedly relieve against oppressive contracts made by a lawyer with his client; but practiced as the profession is in our Courts, we are of opinion that the reason of the English rule does not apply to this case, in which was performed the careful labor of examining the bill—of a thorough examination of the facts on which to found an answer, and to prepare the same—attendance in the examination of witnesses, and much other labor incident to the cause, prior to the final argument. An eminent lawyer of the seventeenth century says that “the fees of the profession of the law are not duties certain, growing due by contract, for labor or service, but gifts; not merces, but honorarium.” The Court are by no means certain but this would have been a better system than ours. If the fees were to be paid in advance, the party would have had certain premises for counting the cost, and in commencing a suit, this very wise precaution would have induced a proper degree of attention. The effect upon the counsel might have been equally salutary, if his services were to be regarded as purely honorary. But we regard the labor of the lawyer, as of other professions, worthy of a fair consideration.

The testimony of Mr. Harris and Mr. Davis is very conclusive as to the amount of labor, and very positive as to the plaintiff's declaration at the time he withdrew from the case. Mr. Harris testifies that “when Mr. Montgomery withdrew as counsel in the case, he said that he had given up any hope of reward, but that he understood him to refer to the future.” Mr. Davis testified that “when Mr. Montgomery withdrew from the case, that he abandoned any hope of future or prospective reward.” The remark, he says, made a deep impression on his mind at the time, being connected, as he was, in the suit. The counsel for the defendant admits that the services

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were valuable, and does not object to the amount of the charge, but rests his defence upon the grounds already considered.

In view of all the facts and the law as applicable to them, we render judgment in favor of the plaintiff for \$315.

Mr. Montgomery, *pro se*.

Mr. Gregg for defendant.

May 28, 1863.

SUPREME COURT—IN PROBATE.

IN THE MATTER OF THE ESTATE OF WM. E. GILL, DECEASED.

Co-EXECUTORS having a several right to receive the debts and assets of the estate, are not compellable like co-trustees to join in receipts; but if they do join, it is equivalent to an admission of willingness to be jointly accountable for the money.

Inventories not required to be filed, until after probate of the will, and not regarded as conclusive, but as *prima facie* evidence of the property that has come to the possession or control of the executor.

If there be several executors, it is the duty of all to see that the estate, or the income arising from it, is applied to the purposes designated by the testator, and for negligence in the discharge of this duty, all the executors regarded as responsible.

A, an executor, was allowed by his two co-executors to retain the possession and use of a large sum of money for upwards of two years, without security, payment of interest or any effort whatever on their part to compel its investment or proper application in a due course of administration, although knowledge of the existence of the fund was brought home to all alike: In such a case, the Court, with a due regard for the interests of the minor heir, refused to grant the application of an executor for a discharge until the fund appropriated by the co-executor should have been accounted for.

Before Justice ROBERTSON, at Chambers.

Per Curiam: On the petition of John Meek, one of the executors, that he be discharged.

William E. Gill died in Honolulu, on the 9th day of August, 1853, leaving a considerable amount of property, which was disposed of by will, the major part being intended as a provi-

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sion for his daughter, Emily. The executors named in the will were, John Meek, Charles W. Vincent and William Wond, who joined in the usual petition for probate, a few days after Mr. Gill's decease. There was an unusually large amount of business in the Probate Court at the time, which caused the hearing of the petition to be delayed. In the meantime, Charles W. Vincent and William Wond filed a petition for the appointment of a receiver, to take charge of the property, until the will could be proved. The Court appointed Charles W. Vincent as such receiver. The will was admitted to probate on the 22d October, 1853, and on the same day John Meek and Charles W. Vincent filed a sworn inventory of the property. In that inventory there appears an item of \$2,750 in cash, "on deposit at the Custom House," and the guardian of Emily Gill now objects to the discharge of John Meek from responsibility as executor, until he shall have accounted for the said item of \$2,750.

The petitioner avers that, although he participated in the proceedings necessary to obtain probate of the will, and signed the inventory of the estate in conjunction with Charles W. Vincent, yet neither the item of \$2,750, nor any other part of the property has ever come to his hands ; and he claims therefore that he cannot be held responsible. No evidence has been given to contradict this averment. On the contrary, Charles W. Vincent testifies that he drew the money deposited at the Custom House, on the 25th of September, 1853, the day after he received his appointment as receiver, which was about four weeks previous to the grant of probate and the filing of the inventory, and that that money never came to the possession of Meek.

It is contended on behalf of the infant devisee, that the executors assumed a joint trust, and are all responsible ; that Meek having joined in filing the sworn inventory, he is conclusively bound by it, and must discharge himself of all the items contained therein, including that of the \$2,750, returned as on deposit at the Custom House, before he can be released from responsibility ; and that the executors were bound, as trustees, to have invested that money for the benefit of the infant.

After a careful examination of the authorities referred to by both parties at the hearing, and many others besides, it seems

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to me that the question as to the precise limit of the legal responsibility devolved upon co-executors, is one by no means free from doubts and difficulties, even at this late day. The apparent uncertainty on this subject arises no doubt, in great measure, from the same fruitful source as the uncertainty which may be met with in some other instances, namely, from the practical difficulty encountered by Courts in the effort to maintain and enforce, uniformly, rules which while they appear in the abstract, just and reasonable, are sometimes found, from the peculiar circumstances of particular cases, to work harshly and inequitably. In *Westly vs. Clarke*, Lord Northington, while speaking of the liability of a co-executor, very justly remarked that "equity arises out of a modification of acts, where a very minute circumstance may make a case equitable or iniquitous. And though former authorities may and ought to bind the determination of subsequent cases with respect to rights, as in the right of curtesy or dower; yet there can be no rule for the future determination of this Court concerning the acts of men."

The law held applicable to the case of co-trustees, appears to be different, at least in the English Courts, from that which prevails with regard to co-executors. The mere fact that trustees, who are authorized to sell lands for money, or to receive money, jointly execute a receipt therefor to the party who is debtor or purchaser, will not ordinarily make either liable, except for so much of the money as has been received by him; although, ordinarily, in the case of executors, it would be different. Co-executors have a several right to receive the debts due to the estate, and all other assets that may come to their hands, and as the separate receipt of one executor is sufficient to discharge any debtor to the estate, they are not compellable, like co-trustees, to join in receipts, and, consequently, if they do join in a receipt, it is their own voluntary act, and equivalent to an admission of their willingness to be jointly accountable for the money. And so if one executor, after receiving the assets, voluntarily pays them over to his co-executor, he becomes responsible for the due application and administration of those assets by that co-executor. (See Story's Eq. Juris., Vol. 2, Secs. 1280 and 1280 a.) The distinction here referred to is said to be finally established, as a general rule, in the equity jurisprudence of

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England, although, perhaps, not universally in that of America. (Story's Eq. Juris., Vol. 2, Sec. 1281.)

The case of *Churchill vs. Lady Hobson et al.*, cited by the petitioner, is the earliest case in which the ancient rigor of the rule of accountability, as against co-executors, appears to have been departed from. That case will be found in 1st Salkeld's Reports, p. 318, but is reported more fully in 1st Peere Williams, p. 240. The circumstances of the case were peculiar, for Goodwyn, the executor, who received the funds, and who afterwards became insolvent, had been the testator's banker in his life time, and for a considerable time after testator's death continued to be a person of very great credit with monied people. On that ground, Lord Chancellor Harcourt declined to hold the other executor, Churchill, responsible for £500 paid over by him to Goodwyn, or for other monies in respect of which he had signed the receipts with Goodwyn, receiving from him a note at the time of each payment, acknowledging that Goodwyn alone had received the money. The Lord Chancellor based his judgment also upon another ground, namely, a difference as between creditors and legatees, unfavorable to the latter. The distinction does not appear to have been adopted in subsequent cases, and, indeed, there seems to be no good reason why the rights of legatees, and those claiming under the statute of distribution, should not be as carefully protected as the rights of creditors. The decision in the case just referred to was approved and followed by Lord Northington, in *Westley vs. Clarke*, in which case the Court denied the existence of any distinction as to liability for each other between co-trustees and co-executors, where they join in giving receipts. In *Hovey vs. Blakeman*, (4 Vesey's R. 608,) the Master of the Rolls said he entirely concurred in *Westley vs. Clark*.

On the other hand, in the case of *Saddler vs. Hobbs*, (2 Brown's Ch. Rep. 95,) the estate of a deceased co-executor was held liable for a moiety of £7,000, for which bills were drawn by the two executors jointly, although this was the only act done by the deceased executor, as such. Lord Chancellor Thurlow, in delivering judgment, said, "I take it to be clear, that where, by any act, or any agreement of the one party, money gets into the hands of his companion, whether a co-trustee or co-executor.

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they shall both be answerable." "The mind of the Court hath changed, in various instances, in cases of trustees ; but, in cases merely in regard to executors, it has continued invariable." "It has been determined, that where two trustees join in receipts or conveyances, and the one, only, receives the money, that party shall be solely liable, as the other joined purely for the sake of conformity. But, in the case of executors, the rule of law prevailed, and both have been deemed liable. As to *Churchill vs. Hobson*, Lord Harcourt founds his opinion upon a distinction between creditors and legatees. That a creditor shall have a right to charge an executor, and a legatee not, seems to me an odd distinction. In the case of *Leigh and Barry*, the rule is confirmed, that trustees shall not be chargeable, but that executors shall, under such circumstances as the present. The only case to the contrary is that of *Westley vs. Clarke*, in the time of Lord Northington. There were particular circumstances in that case ; but I much question that determination."

In the case of *Chambers vs. Minchin* (7 Vesey's Rep., 186) Lord Eldon disapproved of the relaxation of the rule as to executors, and held one executor responsible for a loss occasioned by the sale of stock, in which he joined with his co-executor, who received all the money and absconded. In the course of his judgment, the Lord Chancellor, referring to the rule, said, "executors were by the old law contradistinguished from trustees thus far. It was laid down as a general rule, that where executors joined in a receipt, both having the whole power over the fund, both were chargeable ; where trustees joined, each not having the whole power, and the joining being necessary, only the person receiving the money was by the general rule chargeable. It is impossible to deny, that the rule as to executors has been pared down in a measure by some of the late authorities ; and I will add, in a much greater degree by those authorities than by the precedents to which they refer." "Lord Northington, on *Westley vs. Clarke*, seems to entertain a doubt whether that general rule could be fortified by precedents. I am much mistaken if there are not many. It seems a strong act to dispute the existence of the general rule, when no man can look at the reports of Lord Hardwicke's time

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without seeing that he considered that rule as well established as any, distinguishing between acting upon legal and moral necessity." In the case of *Lord Shipbrook vs. Lord Hinchinbrook*, (11 Vesey's Rep., 252) Lord Eldon held the co-trustees chargeable, on the ground of their negligence in joining without due inquiry, in a power of attorney to the other trustee, for the sale of stock, upon his representation that the money was required to pay debts, which was untrue. His Lordship held that an executor, "having a fund standing in the joint names of himself and another, cannot upon the mere representation of the co-executor, if false, be justified in doing an act that is an exercise of power over that fund. First, the act must be necessary for the purposes of the will; and the person to whom the representation is made, has imposed upon him at least ordinary and reasonable diligence to inquire whether the representation is true."

In the case of *Brier vs. Stokes*, (11 Vesey's Rep., 323) the same learned judge reiterated strongly the doctrine laid down by him in *Chambers vs. Minchin*, maintaining the distinction between trustees and executors, and holding that an executor, as it is not necessary for him to join, interfering in the transaction unnecessarily, he is to be considered as assuming a power over the fund, and therefore answerable for the application; so far as it is connected with the particular transaction in which he joins.

Lord Redesdale, in *Joy vs. Campbell*, (see note to Sec. 1284. of Story's Eq. Juris., vol. 2,) laid down the following doctrine: "The distinction seems to be this with respect to a mere signing, that, if a receipt be given for the mere purpose of form, then the signing will not charge the person not receiving. But, if it be given under circumstances purporting that the money, though not actually received by both executors, was under the control of both, such a receipt shall charge. And the true question, in all those cases, seems to have been, whether the money was under the control of both executors. If it was so considered by the person paying the money, then the joining in the receipt by the executor, who did not actually receive it, amounted to a direction to pay his co-executor; for it could

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have no other meaning. He became responsible for the application of the money, just as if he had received it."

In the case of *Langford vs. Gascoyne* (11 Vesey's Rep., 333) in which the widow placed the funds in the hands of Spurrell, one of the executors, in presence of the other two, Gascoyne and Lambert; and Spurrell, after counting the money, gave it to Gascoyne, through whose insolvency the fund appears to have been lost, Sir William Grant, M. R., held that Spurrell was responsible, the rule being that, if an executor does any act, by which money gets into the possession of another executor, the former is equally answerable with the other; not, however, where an executor is merely passive, by not obstructing the other in receiving it. But if one contributes in any way to enable the other to obtain possession, even with an innocent motive, he is answerable, unless he can assign a sufficient excuse.

Chancellor Kent, in the case of *Monell vs. Monell*, (5 Johnson's Ch. Rep., 275) fully adopted the doctrine of the two cases last cited; and the judgment of Justice McClean in *Edmunds vs. Crenshaw* (14 Peter's Rep., 166) is to the same effect. (See also *Cross vs. Smith*, 7 East, 246; *Sutherland vs. Brush*, 7 Johnson's Ch. Rep., 22.)

I have referred to those cases more particularly on account of the announcement of general principles which they contain, and not because I regard them as expressly applicable in the present case. Here, there is no question arising from a joinder in receipts by Meek with Vincent. The money in question was drawn from the Custom House by Vincent alone, as appears by the receipts produced by the Collector General. Meek was not even a party to the petition for the appointment of a receiver, by means of which the funds deposited at the Custom House came to the hands of Vincent. That petition was signed by Vincent and Wond only.

But it is contended that Meek has made himself responsible by signing with Vincent the sworn inventory of the property.

In considering this point, it must be remembered that the practice which is said to have formerly prevailed, in the Probate Courts of England, of requiring an inventory to be exhibited before probate, has never prevailed in this Kingdom.

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Inventories are not required in our Courts until after probate, and then they are required to be made under oath. They are supposed to contain a full and true exhibit of the entire assets of the testator, whether they may have actually come to the possession of the executor or not. I regard an inventory, under our practice, not as conclusive, but as *prima facie* evidence of the property that has come to the possession, or under the control of the executor. (See *Stearn vs. Mills*, 4 Barn. and Adol., 657.) In the present case, the inventory is signed by two of the executors, and they may be both called upon to discharge themselves of the items of property appearing thereon. It is argued on the part of Meek, that he has complied with this rule, as regards the sum of money in question, by proving that at the time the inventory was filed, the money had in fact been withdrawn from deposit without his knowledge or consent, and that he signed the inventory on the faith of Vincent's signature. In my opinion they are both bound by the sworn inventory, to this extent: that the money must now be regarded as having been in the Custom House vault at the time the inventory was filed. A less stringent ruling, as touching an item of property like this, would be unjust towards creditors and legatees. As Meek signed the inventory, without inquiring whether or not the money still remained at the Custom House, and relying upon the signature of Vincent, he must abide the consequences. The case is therefore in the same position, so far as Meek is concerned, as if the money had been withdrawn from the Custom House by Vincent immediately after probate of the will. But the fact that he signed the inventory does not, of itself, conclusively bind him to account for that money. The question of his responsibility depends upon other considerations, and requires us to examine the remaining point in the cause.

The testator, by his will, devised all his estate to his daughter Emily, in case she should attain the age of eighteen years, or have issue, subject to a life interest in certain portions of the estate in favor of Hannah Gravier. Pending the minority of the said Emily, all the rents, profits and interest accruing from the estate devised to her, are directed to be applied to her maintenance and education. When the executors obtained probate

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of the will, and formally accepted the office of executor, which they all did, they assumed the trust delegated to them, and undertook to perform the duties required of them by law and by the terms of the will. The duties of an executor in this Kingdom are not, as they formerly were (and may be still,) in England, a gratuitous bailment. Under the laws of this Kingdom, an executor does not consent to perform the duties imposed upon him only as a matter of friendship towards the testator and his family, but in part—sometimes altogether—as a matter of business, for the due performance of which he is entitled by law to a reasonable compensation, in the shape of commissions. When one undertakes to perform the duties of executor, he must exercise reasonable care and diligence in carrying out any special trusts devolved upon him by the provisions of the will. If there are several executors, it is the duty of all to see that the estate, or the income arising from it, is applied to the purposes designated by the testator. For negligence in the discharge of this duty, I regard all the executors as responsible. “If one executor knows that the assets received by the other executor are not applied according to the trusts of the will, or in a due course of administration, and he stands by and acquiesces in it, or suffers the assets to be wasted by such executor, without any effort to require or compel a due execution of the trusts, and a due application of the assets in the course of the administration thereof, he will be held liable for any waste or misapplication.” (Story’s Eq. Juris., Vol. 2, Sec. 1280 a.) In the case of *Williams vs. Nixon*, 2 Beavau’s R., 472, Lord Langdale said: “There can be no doubt that, if an executor knows that the moneys received by his co-executor are not applied according to the trusts of the will, and stands by and acquiesces in it, without doing anything on his part to procure the due execution of the trusts, he will, in respect of that negligence, be himself charged with the loss; but in cases of this kind it is always to be observed that, the testator himself having invested certain persons with the character of executors, has trusted them to the extent to which the law allows them to act as executors; and in that character, each has a separate right of receiving and of giving discharges for the property of the testator.” (2 Story’s Eq. Juris., p. 740; note 2.)

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The doctrine recognized by these authorities is eminently just, and in my opinion, must be held applicable to the present case. The knowledge of the existence of the fund in question, and of the disposition which the executors were required to make of it under the provisions of the will, is clearly brought home to all the executors; but the fund never was applied or dealt with according to those provisions. Through negligence, or the want of reasonable care and diligence on the part of Messrs. Wond and Meek, a very large part of that fund has been lost in the hands of their co-executor, by reason of his failure in business. For upwards of two years, and until Mr. Vincent became insolvent, Messrs. Wond and Meek allowed their co-executor to retain the possession and use of that large sum of money, without security, or even the payment of interest, and so far as now appears, without any effort whatever to compel its investment, or proper application in a due course of administration. (See *Lord Shipbrook vs. Lord Hinchinbrook*, 11 Vesey's Rep., p. 254). The most superficial inquiry would have shown them, what is quite evident to the Court, that at the time when Mr. Vincent drew the fund from the Custom House, the money was not required for the payment of claims against the estate.

Admitting that at the time the fund in question was taken possession of by Mr. Vincent, he was apparently in thriving circumstances, that cannot be held sufficient to exonerate Messrs. Meek and Wond from responsibility in having suffered their co-executor to retain the money in his hands without proper security. Subjecting the fund to such a risk, was negligence of so high a degree as to render the parties legally responsible for the loss thereby incurred. Had the money been carefully invested, not only would the principal have now been safe, but the payment of the interest, which ought to have been derived from it for the benefit of the infant devisee would have made a regular and comfortable provision for her maintenance.

As I find myself unable to reconcile a less stringent rule of responsibility with a due regard for the interests of legatees and others, especially where they are minors, and with my deliberate view of the duties undertaken by the executors in the present case, and as it seems to me that a contrary doctrine, if

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upheld by this Court, would operate as a direct encouragement to negligence on the part of executors, while it would not be supported by authority, I must decline to grant the application of Captain Meek for a discharge, until the fund drawn from the Custom House shall have been accounted for.

Application refused.

C. C. Harris, Esq., for petitioner.

A. B. Bates, Esq., for infant devisee.

July 27th, 1863.

SUPREME COURT.

HERMAN CAPLAN *vs.* EDWARD HOFFSCHLAEGER & FLORENS STAPENHORST.

A GENERAL authority conferred upon the master of a vessel to conduct a whaling and trading voyage for a limited period of time, is not to be extended as giving him the power to establish sub-agencies at different points beyond the period expressly set forth.

The principal is only bound by the acts of his agent within the scope of his general authority.

The principal may subsequently ratify the unauthorized act of the agent; but there is a distinction between a ratification of the acts of an agent duly appointed and the ratification of a contract made by a person without authority.

The principal by receiving the proceeds of the sale of goods, may have ratified their sale, but it does not follow that he has ratified a contract made by a person without authority to pay a certain amount of wages for services rendered in such sale.

The owner of the original goods is owner also of the property for which they were given in exchange by an unauthorized agent, and has a right to retain the possession when once it has come to his hands. Such unauthorized person, acting in good faith for the interests of the principal, is entitled equitably to a fair compensation for his services, but he can receive nothing upon a contract made with him by an agent of the principal, who, in making such contract, has exceeded his authority. Where, by the very nature of the transaction, a written authority is known to exist, it is the duty of persons dealing with the agent to make inquiries as to the nature and extent of such authority, and to examine it.

H. Caplan *vs.* Hoffschlaeger & Stapenhorst.

Submitted, by agreement, to the Court.

ALLEN, C. J.

This is an action of assumpsit brought to recover the amount due on an alleged contract of the defendants for services rendered. It is alleged that on or about the 27th March, 1862, the plaintiff entered into an agreement with the defendants by and through L. V. Lass, at Ebon or Boston Island, so called, to labor and trade at said Island for the defendants until the 27th of March last past, for the sum of sixty dollars per month, the interest on the said wages to be credited to the plaintiff every six months. To this declaration the defendants filed a plea of the general issue.

The counsel of the plaintiff offered in evidence the alleged contract made and executed by the plaintiff and L. V. Lass, captain of the brig "Wailua."

It appeared in evidence, that, in January, 1861, the plaintiff shipped as cooper on board the defendants' brig "Wailua," Lass, Master, for a whaling and trading voyage, and to return to Honolulu, for a period of sixteen months; and that, on the 27th of March, 1862, by mutual agreement of the captain and himself, he was discharged from said brig and commenced labor on the Island of Ebon, in accordance with the terms of the agreement, and there continued till he left for this port, where he arrived in April last. The defendants deny the authority of Captain Lass to make this agreement, as their agent, and upon the evidence of this authority, as given in express terms, as is contended, or recognized by subsequent acts, the plaintiff's right to recover depends.

Mr. Banning, who was a clerk in the house of the defendants when the "Wailua" sailed in 1861, and continued in that capacity till January last, when he became a partner, testified, that the defendants proposed to try the experiment of a trade in cocoanut oil on some of the Southern Islands, and Capella, a clerk of the defendants, was sent down on the brig "Wailua," to be landed at Kings Mill or Marshall Islands at the discretion of the captain and himself, for the purpose of obtaining as much information as possible in regard to the trade. It was understood that Capella, the clerk, and Caplan, the cooper, should be left on one of the islands, while the brig was cruising. It

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appears by the shipping articles that there were two coopers engaged, and this witness testifies that when Caplan was shipped, it was expressly understood that he was to remain on the island which might be selected, and do the coopering. It is very evident his services were not needed on the vessel, and the purpose of the enterprise could only be subserved by having a cooper on board, and another on shore where the oil was obtained, as the purchaser was obliged to furnish the casks and cooper them. By the terms of the shipping articles, the voyage expired in May, 1862, and Mr. Banning testifies that when Caplan signed the articles he was told distinctly of the length of time of the proposed expedition.

The "Wailua" did not return as the defendants had expected, and being apprehensive of her fate, they requested Captain Gelett, of the "Morning Star," who left here in June, 1862, to touch on his cruise at Ebon Island, and should he find Capella and Caplan there, to bring them and the oil and merchandise to Honolulu. Capt. Gelett returned in November following, and reported that he had found Caplan there alone, but that he could not bring the oil as his tackle was not strong enough. It appears further that the "Wailua" returned in September of the same year, and it was at this time that the defendant first learned that Caplan was left on the island by the captain, and of the agreement which he had made with him. They were much dissatisfied with the course taken by the captain, and so expressed themselves to him and Capella. It appears that Capella wrote the agreement, and he says that he did it under orders from the captain, and at the time advised him not to make it. As the "Morning Star" returned in November, without the plaintiff and the oil and merchandise, the defendants decided to charter the schooner "Maria" to send for Caplan and the oil and goods unsold. This proved also unfortunate, for the schooner was lost after the oil was placed on board of her. Capella when he returned to Ebon Island had orders to send Caplan up on the "Maria," and he was on board when she was wrecked, but he and the oil were landed in safety, and afterwards were brought up on the "Morning Star," which arrived here in April last. This witness produced an account of the net proceeds of the oil traded for by Caplan. It appears that the oil gauged

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here 2879 gallons, which the defendants value at \$1,583 45. The charges of merchandise, freight and passage of Caplan, casks, &c., amounted to \$1036 and 29-100th dollars, leaving a balance of \$547 and 16-100th dollars.

It is contended by counsel for the defense that, as Capt. Lass had no authority to make this contract, the action could not be sustained, and this is the first question to be examined and decided.

It is very evident that the purpose of the adventure was to select, if possible, a trading post on one of the Southern islands, for the purchase of oil in exchange for goods, while the brig was cruising for whales. This purpose was carried out. The brig was cruising, and Capella and the Captain had selected a trading station, at which place Caplan was doing his duty as cooper. The shipping articles limit the engagements of the men, Caplan included, to a period of sixteen months, and the evidence is very clear and explicit that the adventure was to terminate within the period stipulated in the articles. This is the only express authority given to the Captain. Had he then any authority to make new contracts by which he would establish a more permanent trade than that designed by the contract for the whaling and trading voyage? We think not. That he had authority, by virtue of his office as master of the vessel, to discharge Caplan by mutual agreement, is undoubtedly true, but from that authority he had no right to engage him for a more permanent service. By the evidence, both written and oral, the contract made by the captain terminated by its own limitation. He had no right to detain the men longer than the period stipulated, unless it was occasioned by some power over which he had no control. This was due to the employees. He was under the same obligations to the owners. He had no right to devote the vessel to other purposes than that designed; or to establish trading posts beyond the period stipulated. It put the property of the defendants beyond their control for a longer period than he had authority to do, and subjected them to the necessity of sending for the goods, or the oil for which they might be exchanged, to say nothing of the moral duty which might perhaps arise in sending for the man whom the captain had left in charge. It seems to us that the plaintiff had

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every reason to understand the authority of the captain, because, in the shipping articles, the purpose and length of the voyage for whaling and trading was expressly set forth ; and further, he was distinctly told the period of the voyage, and it appears further that *Capella* remonstrated with the master when making the agreement. From the history of the enterprise, it is very clear that Caplan ought not to have suffered himself to have been imposed upon by the captain. We are aware, however, of the influence which masters of vessels very naturally exert over this class of men.

The counsel for the plaintiff contends that the Captain was a general agent, to do all of a certain business. This is true with this important qualification, that it was for a limited period. He was to be master of the brig "*Wailua*" on a whaling and trading voyage for the period of sixteen months. He was authorized in conjunction with *Capella*, to place *Capella* and Caplan on some island for the purpose of trading in cocoanut oil, and taking charge of the same for a given period, which was not to extend longer than sixteen months for the whole adventure. He had a general authority in regard to this particular adventure, but it was limited by the terms of the shipping articles. He had no authority to establish these agencies beyond the period expressly set forth. If he had authority to establish this agency at Ebon, he could have established others at other islands. If a person is held out to the public by the principal as having a general authority to act for and to bind him in a particular business, it would be unsound in law as in morals, as is contended, to allow him to set up his own secret and private instructions to the agent, limiting that authority, and thus to defeat the transactions under the agency, where the party dealing with him could have no notice of such instructions. In this case the presumption of such instructions is fully negatived. The principle is very clear, and there can be no controversy about it, that the principal should be held bound by the acts of the agent within the scope of his general authority. Time is one of the important powers of an agency. If it is limited, the agency ceases by its terms, and it is in evidence that he was told distinctly of the length of time to which the expedition was to extend when he signed the articles ; and it is expressly

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agreed, as appears by the articles, that Caplan was to serve in a whaling and trading voyage for a term not to exceed sixteen months, or until the brig should return to the Islands. He was informed then fully of the master's authority. "When," says Mr. Justice Story, "a written authority is known to exist, or is by the very nature of the transaction presupposed, it is the duty of persons dealing with the agent to make inquiries as to the nature and extent of such authority, and to examine it." Here a written authority was known to exist, for the plaintiff had become party to it. The acts of a ship-master, as a general agent within the scope of his authority, are binding on his employers, but not beyond it. Suppose for example in a whaling and trading voyage to the Arctic for one season, the master should deem it a good business to engage his men to spend the winter in hunting for furs, and should employ some of his men for that purpose, would that come within the purview of the objects and purposes of the expedition as set forth in the articles, or would he be authorized by an implied authority as master? as Lloyd says in Paley on agency, "that it becomes the duty of the party dealing with one whom he knows, to be acting for another in the transaction, to ascertain by inquiry the nature and extent of the authority, and if it be departed from or exceeded, he must be content to abide the consequences." Because the master had authority to manage and conduct a whaling and trading voyage, it does not follow by its terms or by usage that he has a right to establish trading posts beyond the purpose of the voyage itself. To obtain oil by whaling and by trade, within the period limited, is the object and purpose of the adventure. The master of the vessel is not vested with power to force his employers to continue a business against their **express** injunctions or their will. That the master is liable to the plaintiff is beyond a doubt, for making an engagement which he had no authority to do. As the Captain had no authority to make the contract, the next question which arises is: have the defendants ratified it by any acts of theirs, which is equal in effect to precedent authority. It must be borne in mind that there is a very sound distinction between a ratification of the acts of an agent and the ratification of a contract made by an unauthorized agent, as in this case; the defendants by receiving the pro-

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ceeds of the sale of the goods, have ratified their sale, but it by no means follows that they have ratified a contract made by a person without authority to pay a certain amount of wages for services rendered in the sale. Suppose for example, that a party without the slightest authority should authorize a person to take possession of a herd of cattle and manage and conduct the grazing business for the owner, and he should increase the herds by exchange, and when the owner discovered this interference with his property, he immediately took possession of his cattle, of the old stock as well as that acquired by exchange,—will it be contended that by re-investing himself in the actual possession of his property, although somewhat changed in form by the unauthorized interference, that he thereby ratifies the acts of the party who authorized the wrongful interference? A principal may be bound by the ratification of the unauthorized act of his agent, and also when the latter has improperly substituted another agent under him, the ratification of the principal of the acts of the sub-agent will to all intents and purposes bind him in the same manner as if he had given him the power of substitution. But this principle presupposes an agency. (Story on Agency, § 249.) The reasoning of the counsel for the plaintiff on the general question of ratification is satisfactory, but he errs in its application. Even if the acts of the defendants ratify the conduct of Caplan, it by no means follows that this ratifies the act of Lass in making the contract with him. The defendants repudiated the contract, and as we are of opinion there was no authority to make it, it falls, and Caplan is at work without a contract, but as there is no doubt he acted honestly under the circumstances, he is entitled equitably to a fair compensation for his services, but as the declaration contains only one count, and that, on the contract, we cannot give him judgment for the amount he would be entitled to recover on a *quantum meruit*. The counsel for the defendant claims that he should be paid according to the lay in the shipping articles. But it appears that he was legally discharged on the 27th of March, 1862. Captain Lass had a right, as master of the brig, to discharge his men by their consent. It may or may not have been judicious, but it is very evident he was invested with this power by virtue of his office. The error in the reasoning consists in this: that the

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acts which ratify Caplan's doings, necessarily ratify Lass'. There may be unauthorized acts of several parties on an estate, or in any particular business, but it by no means follows that the ratification of the acts of one is the ratification of that of the others. Of Lass' acts there is no evidence of a ratification. When they heard of the execution of the contract they repudiated it. As the "Wailua" did not arrive when they expected, the defendants requested Captain Gelett in June to call at Ebon and bring Caplan and the oil and merchandise to this place. This act is in accordance with the shipping articles and original understanding, and is an additional act to show that there was no authority given to any one to make arrangements for continuing the trade beyond the originally stipulated period.

The counsel contends that the defendants ratified the contract when they were written to by plaintiff's counsel, and informed that if they refused to pay according to the contract, but would deliver up the oil, the plaintiff would pay all the expenses of securing it, and as they did not do so, they ratified the contract. The oil and goods were the property of defendants; Caplan had no right in it. As they owned the goods, they owned the property for which they were given in exchange, and they had a right to take possession of it, as well as the goods unsold, wherever they could be found.

In this case Caplan was not an agent, and he ought to have returned in the brig according to the stipulations, but as he remained after the captain and clerk left and took charge of the goods and trade, as the Court have before intimated, he should have a reasonable compensation for his services. We are unable to see any ratification of Lass' contract arising from any communication with Caplan. It was Lass' duty, as Caplan knew, to have brought him and the property to Honolulu, but as he did not, he had no authority to make a contract with him to remain at a given rate of wages to take charge and dispose of the property. He thought proper to remain under these circumstances and take charge of the goods, and he should be paid a reasonable sum for it, without regard to the compensation fixed by Lass. He and Caplan had no authority to fix it, and it is very doubtful whether Caplan would be entitled to anything, had not the master of the ship left him there under

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the peculiar circumstances of the case, for it was necessary for some one to take charge of the property. He was far more at fault than Caplan, and as he rendered service he is entitled to pay for it, but not on the contract declared on.

Judgment for defendants, with costs.

Mr. Harris, for plaintiff.

Mr. Montgomery, for defendants.

August 31, 1863.

SUPREME COURT—IN PROBATE.

IN THE MATTER OF THE ESTATE OF WM. E. GILL, DECEASED.

UNDER the general provisions of the 851st Section of the Civil Code, full powers are vested in the Probate Courts of this Kingdom to compel executors to perform their trusts, by making any necessary order, as the circumstances of the particular case may require, upon a proper application for the purpose being made before the Court.

By a fair construction of the statute, such Probate Court possesses all the power that a Court of Equity could exercise in the premises.

Duty of the executor to have invested the funds of the estate, when they came to his hands, for the benefit of the infant devisee.

At Chambers, before Justice ROBERTSON.

Per Curiam. Charles W. Vincent, one of the executors of the will of William E. Gill, of Honolulu, deceased, having, in pursuance of an order made by this Court, in the month of August last, presented and filed his account as such executor, showing a balance due from him to the estate of \$2,452 24, counsel for the guardian of the testator's infant daughter now moves the Court to grant an order requiring the executor aforesaid to present satisfactory security for the future payment of interest as it may accrue, and for the payment of the principal sum to the infant devisee upon her arriving at the age of majority, or requiring him, in default of such security, to pay the amount into Court forthwith. The motion is based upon several grounds, the chief of which are, that whereas it was the

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duty of Mr. Vincent, as one of the executors, to have invested the funds when they came to his hands for the benefit of the infant devisee ; he did not do so, but retained the funds in his possession, using them in his own business, until he became insolvent in the fall of the year 1855 ; and that as he is admitted to be insolvent still, the funds are in jeopardy of being wholly lost, so far as their safety depends upon the responsibility of this executor.

It is contended in opposition to the motion, that it is not within the power of this Court, as a Court of Probate, to grant the order prayed for ; that under the terms of the will, the Court in this case can only require the executors to account for and apply the income, which has been done ; and that the Court of Probate has no authority to order the payment of the funds into Court, or to deprive an executor of his trust, even if he has committed a breach of that trust—the remedy sought being obtainable only in a Court of Equity.

The powers of the several Justices of the Supreme Court, sitting in probate, are no where in our statutes specifically detailed or limited, but are granted in the fullest and most general terms, as will appear by reference to Section 851 of the Civil Code, which reads as follows :

“ The several Justices of the Supreme Court shall have the power at Chambers to grant probate of wills, to appoint guardians and administrators, and again to compel all guardians, administrators and executors to perform their respective trusts, and to account in all respects for the discharge of their official duties. They may in case of moral unfitness, or other good and sufficient cause, remove any administrator, guardian or executor appointed by will or otherwise.”

It is argued, and I think with great force, that, under a fair construction of this provision, this Court possesses all the power that a Court of Equity could exercise in the premises. Nay, I conceive even more, for while a Court of Equity might, in a case calling for that species of relief, appoint a receiver, this Court could remove an executor appointed by will, and appoint another in his place, in the shape of an administrator *cum testamento annexo*, which a Court of Equity could not do.

The jurisdiction of the Probate Courts of this Kingdom, as

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has repeatedly been held, is not to be measured by the limited jurisdiction possessed by the several Ecclesiastical Courts of England. This seems to me sufficiently clear from the language of that portion of the Civil Code just quoted, and our Courts of Probate have always claimed and exercised a much larger jurisdiction than the English Ecclesiastical Courts. In my opinion, the same powers which are generally exercised by Probate Courts in the several States of the North American Union, under statutory provisions more or less definite and minute, are vested in our Probate Courts to the fullest extent, although in general terms.

I believe the authority of this Court is amply sufficient to meet the exigencies of this case, so far as they have yet been developed, and although cases might arise in which the necessary remedy could not be afforded by a Court of Probate, it cannot be questioned, and has been admitted, that, upon acknowledged principles, if this Court may rightfully grant the order now prayed for, it can and may enforce that order in some usual mode.

But it is argued that if this Court assumes to exercise a power which, in some countries, can only be exercised by a Court of Equity, we must resort to the same mode of pleading and practice that prevails in Courts of Equity. It seems to me that this consideration is not entitled to much weight, where, as in this country, full power is vested in the Supreme Court, so to regulate proceedings in Probate Courts as to effectuate all their powers, and to promote justice between parties litigant before those Courts. And I see no reason why a Court of Probate may not accord equal facilities with a Court of Equity for showing cause against the granting or enforcing of any order, the motion for which it is competent to entertain.

In justice to Mr. Vincent, I deem it right to say that he has hitherto manifested his readiness to comply with the orders of the Court, and while, in my opinion, a large part of the estate has been seriously jeopardized, if not wholly lost, while in his keeping, through his negligence and that of his co-executors, it has never appeared to me that he fraudulently misapplied the funds, or that he is not honestly desirous of meeting his liability to the estate, so far as his pecuniary ability will admit.

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As I think it was clearly the duty of the executors, under the terms of the will, to have safely invested, on interest, for the benefit of testator's daughter, all spare moneys of the estate coming to their hands, and that this Court possessed full power to have compelled them to perform that duty, upon proper application, I shall grant the motion now before the Court, with a view to expedite such ulterior proceedings as may, under the circumstances of the case, be found practicable to protect the interests of the infant devisee.

November 18, 1863.

SUPREME COURT—IN ADMIRALTY.

RICHARD MATHISON *vs.* BERNARD H. DAILY.

THE discharge of the libellant, without a trial under the provisions of Section 1178 of the Civil Code, operates merely as a technical acquittal, creating a bar to his being prosecuted criminally, and does not preclude the masters or owners from setting up as a defence to the libellant's claim for wages, the plea, that he attempted to fire the vessel.

Such attempt being established, his claim for wages is conclusively barred.

At Chambers, before Justice ROBERTSON.

The libellant, a colored citizen of the United States, shipped as an ordinary seaman, or green hand, on board of the whaling bark "Martha 2d," at New Bedford, in the month of September, 1862, for a three years voyage in the Pacific Ocean. In the month of February, 1863, the vessel touched at the port of San Carlos, in Chile, and in the month of April arrived off this port. On the night of the 11th April, while the ship was lying on and off outside this port, she was discovered to be on fire in the fore hold. Through the prompt exertions of the officers and some of the crew the fire was extinguished, and the vessel saved from impending destruction. There were unmistakable tokens of the vessel having been wilfully set on fire, and the respondent, who is master of the ship, caused several of the crew, among whom was the libellant, to be placed in irons, on

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suspicion of having committed the crime. The ship continued to lie on and off, and, on the morning of the 14th April, the master, having had his suspicions of the libellant's guilt confirmed, brought him on shore, and carried him before the Consul of the United States, who, after an investigation of the matter, expressed his opinion that, in justice to the owners of the vessel, the libellant ought not to be allowed to proceed to sea in the ship again. The master then caused the libellant to be arrested by the local authorities, and, after an examination had before the Police Justice of Honolulu, he was duly committed, on the 15th April, to stand his trial before the Supreme Court, at the July Term, or thereafter, the jurors in attendance for the April Term, having been discharged on the previous day. The vessel proceeded on her voyage, and the libellant was kept in custody until the last day of the October Term of the Supreme Court, when, as the vessel had not returned with the witnesses for the prosecution, he was set at liberty by order of the Court, under the provisions of Section 1178 of the Civil Code, the Attorney General being unable to proceed against him. The discharge of the libellant from custody, under those circumstances, operated, by express provision of the Statute, as an acquittal, so far that the libellant cannot be legally held again to answer, criminally, for the offence with which he was then charged. Soon after the libellant had been released from prison, the ship returned from the Arctic Ocean, having made a successful cruise. The respondent sent a written request to the libellant to report himself on board the ship, but he refused to comply with that request; and the Consul of the United States, upon application to him, hesitated or declined to issue an official request to the Marshal to apprehend the libellant as a deserter, under the provisions of the United States laws and treaty stipulations. And, now the libellant presents his libel before this Court, claiming that he is entitled to his discharge from the shipping contract, by reason of the acts of the master; that he should be paid wages up to this date, at the lay for which he agreed to serve for the voyage; and that he should be awarded damages, for alleged maltreatment at the hands of the respondent.

Before the Court can sustain the libellant's claim for wages, it

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must appear either that he has fulfilled the contract of shipment upon his part by serving till the end of the voyage, or that he is unable to do so through physical disability, or that he is prevented from doing so by the act of the master or owners of the ship. It is not contended on behalf of the libellant that either of the first two pre-requisites has been shown to exist; but it is claimed that he is released from the obligation to complete his period of service through the wrongful acts of the master, and that he was justified in his refusal to render himself on board again, through a well founded fear of future harsh treatment at the hands of the respondent, who, it is alleged, had before displayed a cruel and tyrannical disposition.

I am unable to discover anything in the testimony laid before the Court touching the conduct of the master towards the libellant, that could afford the slightest pretext for holding that the acts of the former have been in any degree wrongful, malicious, or intentionally injurious. In causing the libellant to be handcuffed and placed in confinement on the night of the 11th of April, the respondent did no more than his duty required of him, in view of the strong suspicions that were thrown upon the libellant, in connection with the attempt to burn the ship. The master appears to have comported himself prudently in that emergency. He used no unnecessary severity towards Mathison, or the men who were at first suspected. The libellant was kept in confinement only from Saturday night till Tuesday morning, during which time he was allowed his meals as usual, and permitted to go out upon deck when necessary. After an inquiry among the crew, the master's suspicions against Mathison became so strong that he brought him on shore, and carried him before the Consul, and it was subsequently resolved to invoke the aid of the local authorities to bring Mathison to trial. The Supreme Court was in session at the time, but the jurors had been discharged for the term, and the libellant was therefore committed to await his trial at a future time. It does not appear to have occurred to those concerned to ask that a special term of the Supreme Court should be held for the trial of Mathison, a request which might have been granted under the peculiar circumstances of the case, for, in order to prosecute

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him at the July term, it would have been necessary to have detained here as witnesses three of the officers and five or six of the crew of the vessel. No doubt the respondent fully expected to return to Honolulu in time for the October term, and had not the ship made an unusually long passage down from the Arctic Ocean, he and the witnesses would have arrived here in good season for that term.

But it is contended on behalf of the respondent that, even if the voyage were now terminated, or if the libellant can be held discharged from the further performance of his contract, through the acts of the master, he is debarred from setting up any claim for wages, by reason of his complicity in the attempt to burn the ship. Had the libellant been regularly tried before a jury, and acquitted of the crime imputed to him, he might have returned to his duty on the ship with credit, completed his contract, and entitled himself to his full wages for the entire voyage. But his discharge by the Supreme Court, without his having undergone a trial, operates merely as a technical acquittal, creating a bar to his being prosecuted criminally, and does not preclude the master or owners from setting up, as a defense to the libellant's claim for wages, the plea that he attempted to fire the vessel. The libellant, by commencing the present suit, voluntarily challenged his accusers to produce the proofs of his guilt; and they have done so. A large number of the officers and crew attached to the vessel at the time of the occurrence in question have given their testimony before the Court, and the weight of that testimony is largely against the libellant. Had the same testimony been spread before a jury, in all probability the libellant would have been found guilty. For my part, after careful reflection upon all the evidence, I do not entertain the slightest doubt that Mathison's was the hand that fired the ship on the 11th of April, and that too without a shadow of provocation, so far as now appears, and to the imminent peril of all on board. His claim for wages is therefore conclusively barred.

The libellant's claim for damages for alleged maltreatment at the hands of the master may be disposed of in a few words. A more palpably trumped up demand never was presented, even before a Court of Admiralty. There is not one iota of proof to

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sustain it ; and the libellant's effrontery in putting forward such a claim is only equalled by the adroitness with which he has succeeded in so completely deceiving and misleading a Proctor of the Court, as to induce him to sign his name to this libel on his behalf. Never, in any case, have the allegations of harsh treatment, or of having displayed a cruel and tyrannical disposition, made against a ship-master, been more triumphantly repelled and disproved than they have been in this case.

The last prayer of the libellant is, that he be declared absolved from the further fulfillment of his contract, by reason of the acts of the respondent. But nothing has been shown in the whole course of the respondent's conduct which would authorize the Court so to hold or declare. No act yet done by him amounts to a violation or legal determination of the contract. In causing the libellant to be confined on board the vessel, and in endeavoring to bring him to trial, the respondent simply did what was his bounden duty ; and he performed it as a humane man and a judicious ship-master. In view of the clear evidence of the libellant's wrongful and malicious conduct, the Court would regard it as an agreeable thing to be able to decree, judicially, that the contract is at an end, for if the libellant should be permitted to go to sea in the vessel again, the interests of the owners might thereby, for obvious reasons, be seriously compromised. But the Court cannot thus decree at the suit of the libellant himself ; it must leave him just where it found him. His position is a singular one. Had he been tried by a jury and convicted, the conviction would have severed him from the ship. But as the matter now stands, his contract for service on board the "Martha 2d" is still subsisting, legally, and yet it is difficult to see how he could be dealt with as a deserter, under the provisions of the Laws of Congress. Had a cross libel been presented to the Court on behalf of the owners, praying that Mathison should be compelled to return on board and perform his stipulated duty, as bound by maritime law, it might have been within the power of the Court to have decreed accordingly, and to have ordered his rendition by the Marshal. I should have felt very much inclined so to have ordered, but only with a view to facilitate his being regularly discharged before the Consul, and to relieve the master

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from his obligation to return the libellant to the United States.

The libellant was allowed to commence his suit upon filing a juratory caution, and it appears that he has no means of paying the costs incurred. Were I not satisfied that the libellant's Proctor has been imposed upon by his client, I should deem it right, and in accordance with the practice of Admiralty Courts, to hold the Proctor responsible for costs. It would be but a slight penalty for the superlative falsehood of his libel if the Court should order the libellant's commitment to prison at hard labor for a term sufficient to cover the amount of the costs, reckoning at the usual rate at which fines are thus liquidated under our Statutes. But I forbear to make such an order, lest I might, by imprisoning the libellant, embarrass the action of the Consul of the United States in any course which he may feel himself authorized to adopt touching the matter.

The libel is dismissed, with costs.

A. B. Bates, Esq., for the libellant.

C. C. Harris, Esq., for the respondent. •

November 25, 1863.

SUPREME COURT—IN ADMIRALTY.

JOHN HEPPINGSTONE *vs.* JOHN MAMMEN.

THE boats of a whaleship in the Northern Seas pursued and got fast to a bow-head whale, and after repeatedly lancing it, were obliged to cut from it, and night coming on, relinquished the pursuit, returning to the ship. The following morning a whale was seen from the mast-head, which subsequently proved to be the same as that wounded the previous evening, and the pursuit was resumed; but the boats of another ship nearer the whale, had already commenced pursuit of the same whale, and afterwards succeeded in killing it, though warned by the officers of the first ship that it had been previously attacked by them, and some of their irons were found in its carcass. The whale was given up to the first ship. Upon the question as to the division or share, if any, to be awarded to the second vessel: *Held*, that the rule of the common law, touching the rights of pursuers and captors of animals *feræ naturæ*, did not apply to cases like the present arising on the high seas, but in the absence of any positive rule of maritime law, the Court was bound to decide ac-

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ording to equity and natural right. And that as the whale had at first been partially disabled by the crew of the first vessel, and a diligent search maintained, though finally killed by the boats of the second ship, it might be regarded as the joint prize of both ships, and the Court decreed the libellant one-half of the proceeds (oil and bone.)

At Chambers, before Justice ROBERTSON.

The libellant is master of the whaling bark "Richmond," of New Bedford, and the respondent is master of the Oldenburg whaleship "Oregon." The object of the libel is to recover the whole, or a share of the proceeds of a whale, known to whalemens as a "bowhead," captured in the Sea of Ochotsk on the 30th of May last, which yielded one hundred and fifty barrels of oil and two thousand pounds of whalebone. The evidence in the cause is very lengthy, and somewhat conflicting, as might be expected when many of the witnesses are interested parties, and I will state, with a view to a proper understanding of the decision, what I regard as having been proven in substance.

Late in the afternoon of the 29th of May, while the boats of the "Oregon" were down, one of her officers descried a whale, and the boats going in pursuit, one of them struck and got fast to it. The whale ran so fast that the other boats were unable to get up to it. There was a good deal of floating ice around. After the first boat had been fast to the whale for about two hours, during which time it had been lanced once or twice, and showed thin blood in its spout, the boat was dragged against some ice too thick to be penetrated, so that the line had to be cut, and the whale disappeared. It was then about sundown. The three boats waited a few minutes, but as nothing was seen of the whale, the officers resolved to return to the ship. Unexpectedly, the whale rose again between the boats and the ship. Mr. Costa fastened to the whale again, but his boat got stove. Upon a signal being made, two fresh boats were lowered from the Oregon. Mr. Lupson fastened to the whale, while Mr. Allen picked up Mr. Costa and his crew. Mr. Allen pulled up near the whale and shot a bomb-lance into it, causing it to show blood freely in its spout, and then pulled to the ship. The whale came near the ship, and Mr. Allen fastened to it, just as it was going down. When it rose again Mr. Terry struck it, making three boats fast. Mr. Lupson's boat got into a strip of

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ice and had about four hundred fathoms of line out. Mr. Allen gave the whale a bomb-lance. Mr. Terry gave it a hand-lance and got his boat stove. Mr. Allen succeeded in lancing the whale again, and it appeared disabled. The ship was within a quarter of a mile, and it was dark. Mr. Terry and his crew were in the water calling for help, and Mr. Allen cut his line and went and picked them up, carrying them to the ship. Respondent ordered Mr. Allen off again in pursuit of the whale, and on approaching Mr. Lupson, who was still in the ice, he told him he was still fast to the whale, but on hauling in his line, it appeared that one of his harpoons had drawn from the whale, and the warp of the other had been cut by the ice. The whale had disappeared, but the officers, expecting that it would die before daylight, stuck a boat's mast with a waif on a cake of ice to mark the place where they had last seen it. They returned to the ship at ten o'clock. During the darkness the ship was kept near the spot, and by three o'clock Mr. Costa lowered a boat and went in search of the whale. By six o'clock he returned on board with the waif, which he had found, but had seen nothing of the whale. It was foggy till about half-past nine, when Mr. Costa went aloft with a spyglass, on the look-out. The ship was steered in the direction it was thought the whale might have taken. After Mr. Costa had been aloft for about an hour, he saw a whale on the lee bow, heading to windward, and immediately after called out that a bark ahead, some three miles off, and on the opposite tack, was lowering her boats. Capt. Mammen went aloft and taking the spyglass said he thought he saw something sticking on the whale's back. He ordered Mr. Allen and Mr. Lupson to lower their boats, telling the former to warn the "Richmond's" boats off if it should prove to be the missing whale. Mr. Allen and Mr. Lupson went along under sail, but the whale having got to windward of the boats, they took to their oars, Mr. Allen hoisting a waif. When the whale went down again Mr. Allen got up to Captain Heppingstone's boat, and asked him if the whale had harpoons in its body, to which the latter replied that he thought it had, Mr. Allen told him he thought it was the same whale the "Oregon's" boats had been obliged to cut from the previous night, and that there were four or five harpoons in its body. Libellant

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called to his officers to strike the whale if they got an opportunity to do so. It rose behind a point of ice, near the boat of Mr. Rogers, the third mate of the "Richmond," and he fastened to it. The whale did not sound, but ran a short distance near the surface, when Mr. Rogers lanced it several times, as did also a boatsteerer of another of the "Richmond's" boats, mortally wounding it. Mr. Allen pulled close to it, and his boatsteerer said he recognized their harpoon poles in its body. Allen then told libellant that he was sure it was the same whale. Libellant asked him if their harpoons were marked. Allen told him some were marked and some not. He replied that if the harpoons had the "Oregon's" mark, that would prove it was their whale, or the whale they had struck, or something like that. The whale got under a piece of ice, and Rogers was obliged to cut his line, but it came up after a time in a patch of clear water, and Rogers, having got round the intervening ice, killed it. Libellant and the officers of the "Oregon" then held a parley, and proceeded to cut out some harpoons. The first one found had no mark, but the second and third had the "Oregon's" marks. Libellant proposed to Mr. Costa to let him have half the whale, but the latter said libellant had better go on board the "Oregon" and speak to the respondent. Libellant said he did not know that by law he could demand half, but thought he ought to have it, and, giving orders to his officers to assist in towing the whale clear of the ice, pulled away towards the "Oregon," saying he did not give up the whale till he had seen the respondent. Libellant went on board and saw the respondent, who refused to give him half the whale, whereupon libellant left, saying he would see about it at Honolulu, and soon after signalled his boats to repair on board the "Richmond." Mr. Wilcox and the libellant have testified that the respondent, since the return of the ships to Honolulu, admitted in conversation with them, that his boats could not have secured the whale without the aid of the "Richmond's" boats, but respondent denies that he ever meant to make such admission.

The case is a novel one in this Court, and somewhat perplexing. The several masters of whaleships who have testified in the cause, concur in saying that they have never known a case precisely like this. According to the English common law doc-

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true, exclusive property in animals *feræ naturæ*, may be acquired by their immediate manucaption, or by taking and killing them ; and also by the wounding of them, by one not abandoning his pursuit, in such a way as to prevent their escape and bring them within his certain control, and by encompassing them with nets and toils, or otherwise intercepting them, so as to deprive them of their natural liberty and render escape impossible. But merely starting and pursuing them gives no right of property ; and therefore an action cannot be supported against one who intercepts and kills them in the view of the pursuer, while he is continuing the pursuit. (See Bacon's Abr., Vol. 4, page 431 ; Buster vs. Newkirk, Johnson's Rep., Vol. 20, page 74.)

It is argued on behalf of the libellant, that, if the present case is to be governed by the doctrine just referred to, the whale belonged to the "Richmond," because her men found it loose, attacked and killed it. On the other hand, it is contended that the English common law rule should not be held applicable to such a case, and even if it were that the whale belonged to the "Oregon," whose men first attacked and wounded, and afterwards resumed the pursuit of it, before the "Richmond's" men struck it. If the case were to be decided by the strict rules of the common law, it might be said that the libellant, having voluntarily parted with the possession of the whale to the respondent, with a full knowledge of all the facts, had precluded himself from maintaining an action to recover back the proceeds of the whale for himself or the owners. But I am of opinion that the rules of the common law, *eo nomine*, are not applicable to any branch of the case ; and it is admitted, on behalf of the libellant, that the doctrine quoted above has been modified to some extent, by the universal usage prevailing in the whaling business, so as to affect the decision of this case on its merits. Further, although the rule of the common law touching animals *feræ naturæ*, may be considered recognized here, so as to govern cases arising within the Kingdom, the Court is not bound to apply that rule to cases arising on the high seas, but in the absence of any positive rule of maritime law, is bound to decide according to equity and natural right. The libellant did not claim the entire whale, but said he considered himself fairly en-

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titled to a half of it, and when he relinquished the possession to the respondent, he did so with an intimation that he intended to assert his claim to that extent upon the return of the ships to port. It would be unjust therefore to debar him from doing so, by a technical rule. It is better that, when such cases occur in the remote regions where the whalers of different nations pursue their prey, the parties should feel that it is not necessary to maintain what they may conceive to be their rights by resorting to force, but may safely leave the adjustment of those rights to a Court of Admiralty, whose duty it is in general, as a matter of comity, to judge and administer civil justice in maritime concerns, between the citizens or subjects of any friendly nation, exhibiting a cause within its jurisdiction.

According to the usage which prevails among whalers, as I understand it from the evidence, if the "Richmond" had fallen in with the whale dead, having died of the wounds inflicted on it by the "Oregon's" men the previous evening, and the respondent had arrived and asserted his claim to it, before it was "cut in," the libellant must have given it up. But if the "Richmond" had fallen in with the whale wounded, as it was, lowered her boats and killed it before the "Oregon's" boats had joined in the pursuit, the whale would have belonged exclusively to the "Richmond." What makes the difficulty in the case is that, before the "Richmond's" officer struck the whale, the boats of the "Oregon" had joined the pursuit, and her officers had warned the libellant that they had reason to believe it was the same whale that they had lost sight of during the night, with several of their harpoons in its body. Of course, the libellant was not therefore bound to refrain from endeavoring to kill the whale, because the "Oregon's" officers might have been mistaken. It might have been a different whale, for there were other ships within sight. But just after the whale was struck, Mr. Allen pulled close to it, so that his boatsteerer recognized the "Oregon's" harpoon poles in the whale's blubber, and then Mr. Allen told the libellant he was certain it was the "Oregon's" whale. It is contended therefore on behalf of respondent, that when the libellant, after that warning, allowed his officer to go on and kill the whale, he did so merely upon the possibility that, after all, it might be found that the harpoons

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in the whale's carcass were not marked with the "Oregon's" brand, in which case the libellant might have retained the whale.

On the other hand, it is argued with a good deal of force that when the whale was first seen from the "Richmond," it was enjoying its natural liberty, a fair prize to the first captor, not being even pursued by any one, and that her boats were first lowered in pursuit. It is true that active pursuit, on the part of the "Oregon," had been relinquished when the whale became lost in the darkness of the previous night, for pursuit implies that the game is in sight. But after pursuit became possible, the "Oregon" maintained a diligent search for the missing whale, and as soon as it was again discovered, resumed its active pursuit. Were it not for the fact that the officers of the "Oregon" had joined in the pursuit with the means for capturing the whale, and given notice to the "Richmond's" officers before they struck it, I should feel it my duty without hesitation, to hold that the whale belonged to the "Richmond." It is said that the whale being free, the boats of the two ships joined in pursuit on equal terms, and some evidence has been given tending to show that, as the usage is understood among whalemens, particularly in American ships, even under all the circumstances of this case, the libellant had a right to capture the whale if he could, and to retain it. I am not satisfied that the usage has been proven to exist so as to sustain the libellant's claim to that extent, and if it were, I should deem it unreasonable. Supposing the libellant had retained possession of the whale and cut it in, the respondent assenting under protest, and intimating his intention of litigating the matter at Honolulu, I should have thought it unjust to deny his claim to at least a half of the whale. His crew underwent the peril of the first attack, wounded and partially disabled the whale, rendering its final capture less difficult, and with stoven boats, were obliged by the darkness to give up the pursuit, but on the whale being again discovered, resumed the pursuit with a fair prospect of success, and would it have been held then that respondent had no right to any part of the proceeds? I think not.

The question now is, can the respondent, in equity and good conscience, retain the whole, or is the libellant justly entitled

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to a share of the spoil? True, the usage of the whaling business has so far modified the common law rule, that the officers of the "Oregon" need not have unremittingly kept up the pursuit, and wounded the whale to such a degree as utterly to prevent its escape and bring it within their *certain* control, in order to preclude the claims of other pursuers. If they had been seen fast to the whale, for instance, although its capture was still quite uncertain, or, even if they had been seen to cut loose from it, but maintaining an active pursuit, the officers of the "Richmond" would not have been justified by the usage, under those circumstances, in capturing and retaining the whale. But the whale was free, although wounded, going to windward towards the ice at a good pace. The chances for its escape were rather in its favor, and he would be a rash man and a foolish, who would say on his oath, that he would certainly have captured that whale, for it is emphatically true, in the pursuit of whales, that "there is many a slip 'twixt the cup and lip." When Mr. Allen was pressed upon that point, he went no farther than to say, that he thought the "Oregon's" boats had as good a chance to secure the whale as the "Richmond's." When the whale was struck by Rogers, it was behind the first streak of ice, and after having been repeatedly lanced it succeeded in getting under a thick piece of ice farther to windward, and Rogers was obliged to cut adrift from it, so that, as some of the parties have testified, they thought it very doubtful if they should ever see the whale again. But it did rise again, farther in between the streaks of ice, and Rogers, having succeeded in getting his boat into the place, again struck, and killed the whale.

It seems to me, that, under all the circumstances of the case, the whale may fairly be considered the joint prize of both ships; and I shall, accordingly, decree that the respondent deliver to the libellant seventy-five barrels of good bowhead oil and one thousand pounds of whalebone, of at least medium size, and that the costs be equally divided.

Mr. Harris, for libellant.

Mr. Montgomery, for respondent.

December 10th, 1863.

Estate of His Majesty Kamehameha IV.

SUPREME COURT—IN BANCO.

APRIL TERM—1864.

IN THE MATTER OF THE ESTATE OF HIS MAJESTY KAMEHAMEHA IV.,
LATE DECEASED.

HISTORY of the nature of land tenures in this Kingdom, and construction of the Act of 7th June, 1848, as affecting the rights of dower and inheritance in the lands set apart to the Crown by the instrument of reservation, executed by Kamehameha III. on the 8th March, 1848.

By the said Act, which is entitled "An Act relating to the lands of his Majesty the King and of the Government," the lands reserved to the then reigning sovereign, descend in fee, the inheritance being limited to the successors to the throne, each successive possessor having the right to dispose of the same as private property, subject however to her Majesty's right of dower, there being nothing in the said Act, taking away the Queen's right to dower in the reserved lands, therein named : Nor, is there any law of the Kingdom, making the matrimonial rights of the wife of the King, any less or different from those of the wife of any private gentleman.

The descent of that part of his late Majesty's estate, other than the lands, reserved to the Crown by the Act of 1848, must be governed by the general law of inheritance and distribution, and her Majesty Queen Emma is entitled as statutory heir to one-half of that property, instead of dower, the latter right being merged in the superior right of heir, after payment of such debts as are not specifically charged upon the reserved lands.

Justice ROBERTSON delivered the judgment of the Court as follows :

A difference of opinion having arisen touching the descent of the property held and possessed by his late Majesty Kamehameha IV., a case has been submitted to the Court, upon an agreed statement of facts, in order that the rights of the several high personages interested may be solemnly adjudicated upon and amicably settled.

It is claimed on behalf of his Majesty Kamehameha V., that he, as hereditary successor to the throne, shall inherit the entire estate, both real and personal, derived from his Majesty Kamehameha III., at his decease, and held by Kamehameha IV., the King lately deceased.

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On the part of Queen Emma, lately the consort of his Majesty Kamehameha IV., it is claimed that all the property possessed by her late royal husband was his private property, and must descend in accordance with the general law of the Kingdom, and that she is therefore entitled to inherit one-half of his real and personal estate, after payment of his debts, and to take dower in the other half.

We deem it unnecessary to recapitulate here the statement of facts submitted on behalf of the parties, as these facts will be referred to in the course of our decision, as such reference may be necessary to elucidate the grounds upon which our judgment rests.

In order to simplify the case we will first dispose of the claim for dower in one-half of the estate, in addition to an absolute right in the other half, as heir under the Statute, set up on behalf of Queen Emma. In our opinion, if she is entitled to dower at all, she must take dower in the entire estate which came to her late royal husband with the Crown, at the demise of his predecessor Kamehameha III. If, as is claimed on her behalf, she is entitled as a statutory heir to take one-half of her late husband's estate absolutely by way of inheritance, she cannot take dower also in the other half. In that case her right to dower, as widow, would be lost in her superior right to inherit as an heir. She cannot take in both those rights in the same estate.

The claim to the entire estate, as an appanage of the Crown, put forward by the Attorney-General on behalf of his Majesty the present King, is made to rest chiefly on the construction which it is contended should be given to the Statute passed on the 7th day of June, A. D. 1848, entitled "An Act relating to the lands of his Majesty the King, and of the Government." The preamble to that Act, and the portions of it which bear upon the case, read as follows :

"WHEREAS, It hath pleased his most gracious Majesty Kamehameha III., the King, after reserving certain lands to himself as his own private property, to surrender and forever make over unto his chiefs and people the greater portion of his royal domain ;

"*And whereas*, It hath pleased our Sovereign Lord the King,

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to place the lands so made over to his chiefs and people in the keeping of the House of Nobles and Representatives, or such person or persons as they may from time to time appoint, to be disposed of in such manner as the House of Nobles and Representatives may direct, and as may best promote the prosperity of this Kingdom and the dignity of the Hawaiian Crown; therefore,

“Be it enacted by the House of Nobles and Representatives of the Hawaiian Islands in Legislative Council assembled,

“That, expressing our deepest thanks to his Majesty for this noble and truly royal gift, we do hereby solemnly confirm this great act of our good King, and declare the following named lands, viz: (Here follow the names of the several lands.) To be the private lands of his Majesty Kamehameha III., to have and to hold to himself, his heirs and successors forever; and said lands shall be regulated and disposed of according to his royal will and pleasure, subject only to the rights of tenants.”

After the foregoing follows the acceptance by the Legislature of the lands made over by the King to the Hawaiian Government, the lands being mentioned by name.

It is contended by the Attorney-General that by the true construction of this act it must be understood as declaring that the lands reserved to himself by Kamehameha III., in the grand division of 1848, were to descend forever to his heirs and successors on the throne, as a Royal Domain annexed to the Hawaiian Crown, and that they are not subject even to the right of dower.

On the other hand it is argued that by a fair construction of the act taken in connection with the instrument of reservation signed and sealed by Kamehameha III. on the 8th day of March, 1848, of which the act of the Legislative Council was simply a confirmation, the lands in question were declared to be the private property of Kamehameha III., his heirs and assigns, that as such, they are not only subject to the right of dower, but distributable under the statute regulating the descent of property generally like other private estates of persons dying intestate, and that therefore her Majesty Queen Emma, in the absence of any lineal heir of her husband, the late King, is entitled to one-half of the estate under the peculiar provisions of Hawai-

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ian law, which would pass the other half to his Royal Highness M. Kekuanaoa, the surviving father of the late as of the present King.

The view which the Court takes of this matter, after the most careful examination and reflection, agrees in some respects with the views so ably propounded by the learned counsel for both the royal claimants, and yet as will be seen, differs materially from either.

It is conceded that the Court, in order to enable it to give a just construction to the act of the 7th of June, 1848, is at liberty to refer not only to the two instruments executed by his Majesty Kamehameha III., on the 8th of March, 1848, which were unquestionably the foundation of the Legislative enactment, but also to Hawaiian history, custom, legislation and polity, as well as to the records of the Privy Council, and the acts of the parties immediately interested subsequent to the great division.

The nature of land tenures in this Kingdom, prior to the great changes effected during the reign of Kamehameha III., will be found very clearly explained in the "Principles adopted by the Board of Commissioners to quiet Land Titles," (vol. 2 Statute Laws, page 81,) which were drawn up with much care upon the most valuable testimony that could be obtained. It is therein declared that "When the islands were conquered by Kamehameha I., he followed the example of his predecessors, and divided out the lands among his principal warrior chiefs, retaining, however, a portion in his own hands to be cultivated or managed by his own immediate servants or attendants. Each principal chief divided his lands anew and gave them out to an inferior order of chiefs or persons of rank, by whom they were subdivided again and again after (often) passing through the hands of four, five or six persons from the King down to the lowest class of tenants. All these persons were considered to have rights in the lands, or the productions of them, the proportions of which rights were not clearly defined, although universally acknowledged. All persons possessing landed property, whether superior landlords, tenants or sub-tenants, owed and paid to the King not only a land tax, which he assessed at pleasure, but also service which was called for at discretion, on all the grades from the highest down. They also owed and

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paid some portion of the productions of the land in addition to the yearly taxes. A failure to render any of these was always considered a just cause for which to forfeit the lands. The same rights which the King possessed over the superior landlords and all under them, the several grades of landlords possessed over their inferiors, so that there was a joint ownership of the land, the King really owning the allodium, and the person in whose hands he placed the land, holding it in trust." Such was the nature of the tenures, and such the titles by which the lands were held, when in 1839 protection was declared both for person and property in the following words: "Protection is hereby secured to the persons of all the people, together with their lands, their building lots and all their property." (See old Laws, page 10.) "The same law confirms what has been already stated in relation to the rights of his Majesty the King in all lands. Section 3d requires that every tenant of land shall work thirty-six days in the year for the King or Government, showing clearly that there is no individual who has an allodial title to the soil, that title remaining with the King." (Principles, vol. 2, Stat. Laws, p. 82.) The Commissioners proceed to say that the King could not dispose of the allodium to any other person without infringing on the rights of the superior lord, nor could the lord, if he purchased the allodium, seize upon the rights of the tenants and dispossess them. "It being therefore fully established, that there are but three classes of persons having vested rights in the lands: 1st, the Government, (i. e. the King;) 2d, the landlord; and 3d, the tenant—it next becomes necessary to ascertain the proportional rights of each." (Ibid, p. 83.) The Commissioners, in view of the evidence given, arrived at the conclusion that, should the King allow to the landlord one-third, to the tenant one-third, and retain one-third himself, he, according to the uniform opinion of the witnesses, would injure no one unless himself. (Ibid, p. 83.) It was the imperative necessity of separating and defining the rights of the several parties interested in the lands, which led to the institution of the Board of Land Commissioners, and to the division made by the King himself, with the assistance of his Privy Council.

At the death of Kamehameha I., his son Liholiho, Kameha-

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meha II., was recognized as King in accordance with his father's express will. Along with the Crown, Kamehameha II. inherited all his father's rights as an absolute sovereign and as suzerain or lord paramount of all the lands in the Kingdom, which rights, unimpaired, descended with the Crown to Kamehameha III. upon the death of his brother and predecessor.

In the year 1839 began that peaceful but complete revolution in the entire polity of the Kingdom which was finally consummated by the adoption of the present Constitution in the year 1852. His Majesty Kamehameha III. began by declaring protection for the persons and private rights of all his people from the highest to the lowest. In 1840 he granted the first Constitution by which he declared and established the equality before the law of all his subjects, chiefs and people alike. By that Constitution, he voluntarily divested himself of some of his powers and attributes as an absolute Ruler, and conferred certain political rights upon his subjects, admitting them to a share with himself in legislation and government. This was the beginning of a government as contradistinguished from the person of the King, who was thenceforth to be regarded rather as the executive chief and political head of the nation than its absolute governor. Certain kinds of public property began to be recognized as Government property, and not as the King's. Taxes which were previously applied to the King's own use were collected and set apart as a public revenue for Government purposes, and in 1841 his Majesty appointed a Treasury Board to manage and control the property and income of the Government. But the political changes introduced at that period did not affect in the least the King's rights as a great feudal Chief or Suzerain of the Kingdom. He had not as yet yielded any of those rights. It was expressly declared that he should still retain his own lands, and lands forfeited for the non-payment of taxes should revert to him. (Old Laws, p. 12.) Under the first law relating to the descent of lands to heirs, a portion of the lands held by any landlord were at his death to be restored to the King; and in case the landlord died leaving no heir, his lands and other property belonged to the King, by escheat. (Old Laws, p. 47). Kamehameha III. gave a striking proof of his power as suzerain of the Kingdom, when he re-

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sumed the possession of all the fishing grounds within his dominions, for the purpose of making a new distribution of them, with the consent of his chiefs in Council. (Old Laws, p. 36 ; *Haalelea vs. Montgomery*, vol. 2, Haw. Rep., p. 62.)

The laws organizing the executive departments of the Government were enacted in the year 1846. Those laws provided among other things for the establishment of the Board of Land Commissioners, for the purpose of effecting a division of rights in land and of quieting the titles throughout the Kingdom. The subject of rights in land was one of daily increasing importance to the newly formed Government, for it was obvious that the internal resources of the country could not be developed until the system of undivided and undefined ownership in land should be abolished. Several expedients were resorted to with a view to obviate in some measure the existing difficulties, in advance of the action of the Land Commission. With that view the Legislative Council on the 7th November, 1846, passed a series of joint resolutions on the subject of rights in lands, and the leasing, purchasing and dividing the same. (Statute Laws, vol. 2, page 70 ; see *Oni vs. Meek*, Haw. Rep., vol. 2, p. 87.) But it was evident that such expedients could be of but little real benefit, while it must also have been foreseen that the operations of the Land Commission would occupy a long series of years, and that the Commission would encounter much difficulty in settling the rights of the chiefs and konohikis. In the month of December, 1847, the subject was discussed at length in the Privy Council. The record of that discussion is of the highest interest and has been carefully examined by the Court. It was finally resolved by the King in Council to effect, through the assistance of a Committee, a division of lands between the King, as suzerain, and the high chiefs and konohikis, his feudatories. That division appears to have been effected with dispatch, for by the end of February, 1848, it was completed.

The King had resumed the possession of the larger part of the lands previously in the possession of the chiefs and landlords, and the remainder had been granted to the several holders by freehold title certified to the Land Commission for its formal award, and capable of being converted into an allodial

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title, by payment to the Government of a commutation to be fixed in Privy Council.

His Majesty's suzerainty over the lands held by his chiefs and other individuals was then at an end. He stood possessed of the lands which were in his own hands previous to the division, and of those resumed in the division, constituting together a large part of the landed property of the kingdom—a truly royal domain. But it is evident from the minutes of the Privy Council, that the lands comprised in that domain were not regarded as the King's private property strictly speaking. Even before his division with the landholders, a second division between himself and the government or state was clearly contemplated, and he appears to have admitted that the lands he then held might have been subjected to a commutation in favor of the government, in like manner with the lands of the chiefs. The records of the discussion in Council show plainly his Majesty's anxious desire to free his lands from the burden of being considered public domain, and as such, subjected to the danger of confiscation in the event of his islands being seized by any foreign power, and also his wish to enjoy complete control over his own property. Moved by these considerations and by a desire to promote the interest of his Kingdom, he proceeded with an exalted liberality to set apart for the use of the government the larger portion of his royal domain, reserving to himself what he deemed a reasonable amount of land as his own estate. To effect that object he signed and sealed on the 8th of March, 1848, two instruments contained in the Mahele Book, the first of which reads as follows :

“E ike auanei na kanaka a pau ma keia palapala, owau o Kamehameha III., no ka lokomaikai o ke Akua, ke 'Lii o ko Hawaii nei pae aina, ua haawi au i keia la no ko'u makemake maoli no, a ua hoolilo a me ka hookaawale mau loa aku i na 'Lii a me na kanaka, ka nui o ko'u aina alii e pono ai a e pomaikai ai ke Aupuni Hawaii, nolaila, ma keia palapala ke hookoe nei au no'u iho a no ko'u poe hooilina a no ko'u poe hope a mau loa aku, na aina a'u i kakauia ma na aoao 178, 182, 184, 186, 190, 194, 200, 204, 206, 210, 212, 214, 216, 218, 220, 222, o keia buke, ua hookaawaleia ua poe aina la no'u a no ko'u poe hooilina a me na hope a'u a mau loa, he waiwai pono no'u aole mea e ae.”

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That instrument we translate into English thus :

“Know all men by these presents, that I, Kamehameha III., by the grace of God, King of these Hawaiian Islands, have given this day of my own free will, and have made over and set apart forever to the chiefs and people the larger part of my royal land, for the use and benefit of the Hawaiian Government, therefore by this instrument I hereby retain (or reserve) for myself and for my heirs and successors forever, my lands inscribed at pages 178, 182, 184, 186, 190, 194, 200, 204, 206, 210, 212, 214, 216, 218, 220, 222, of this book, these lands are set apart for me and for my heirs and successors forever, as my own property exclusively.”

The other instrument which was also executed in the Hawaiian language, we translate into English thus : Know all men by these presents, that I, Kamehameha III., by the grace of God, King of these Hawaiian Islands, do hereby give, make over and set apart forever to the chiefs and people of my Kingdom, and convey all my right, title and interest in the lands situated here in the Hawaiian Islands, inscribed on pages 179 to 225, both inclusive, of this book, to have and to hold to my chiefs and people forever.

These lands are to be in the perpetual keeping of the Legislative Council (Nobles and Representatives) or in that of the superintendents of said lands, appointed by them from time to time, and shall be regulated, leased, or sold, in accordance with the will of said Nobles and Representatives, for the good of the Hawaiian Government, and to promote the dignity of the Hawaiian Crown.

By referring now to the confirmatory Act of the 7th June, 1848, it must be apparent to every one, from the close similarity of the language used in said Act with that of the instruments just recited, that the Legislative Council simply intended by that Act to ratify what had been already done by the King in Privy Council, and thereby bind the nation to its faithful observance forever. We think the Attorney General was mistaken when he said the Act of 7th June, 1848, appeared to have been drafted hastily or inadvertently. It is within the knowledge of the Court that the Act in question was prepared in the English language by the late Chief Justice Lee, who had taken a promi-

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ment part in the discussion of the subject in the Privy Council, and who in common with other councillors appears to have been fully alive to the nature and importance of the business, and knew well the legal import of the language introduced into the Act.

His Majesty King Kamehameha III. had no surviving child of his own, but had adopted his nephew, Prince Alexander Liholiho. In the month of April, 1853, his Majesty, with the consent of the House of Nobles, and in accordance with the 25th Article of the Constitution, publicly proclaimed Prince Liholiho as his successor on the Throne. At the same time he made and executed his last will and testament, declaring his will both in regard to the descent of the Crown and the disposition of his estate. By the first clause of that instrument he declared his will that, Prince Liholiho, his adopted child, should be his heir and successor to the Crown. By the second clause he declared that if Prince Liholiho should not survive him or should become incapacitated under the Constitution, his will was that Prince Lot Kamehameha should be heir to the Throne, and failing him, the Princess Victoria Kamamalu. By the third clause he directed that all his just debts should be paid out of his estate by his executors as soon as convenient after his decease. By the fourth clause he devised to his consort Queen Kalama, certain lands in lieu of dower provided she should accept the same. By the fifth clause he devised all his remaining estate to his adopted son Prince Liholiho. His Majesty died on the 15th December, 1854, and was succeeded by Prince Liholiho as Kamehameha IV. The will of Kamehameha III. was duly proved before the Hon. Lorrin Andrews, Judge of Probate, on the 27th day of January, 1855, and the provisions thereof, touching the King's estate, were carried out by the executors.

It is admitted that from the time when Kamehameha III. separated his own property from that of the Government, in 1848, up till his death, he dealt with his reserved lands as his own private estate, leasing, mortgaging or selling the same at his pleasure. Ever since the division, those lands, except such as have been sold, have always been known as the King's lands, and have been managed by an agent or land steward appointed by the King. After the death of Kamehameha III., Queen

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Kalama declined to accept the lands devised to her by the King's will, in lieu of dower, on the ground that she had received these lands from him in the division of 1848. Her right to dower was acknowledged by King Kamehameha IV., who made an amicable arrangement touching the same, by setting upon her a fixed annuity for life, in consideration of which she relinquished her claim for dower by deed. In the year 1856 the late King married his still surviving consort Queen Emma. No ante-nuptial agreement was made as to their property, nor any provision in the nature of a jointure for the Queen. During his Majesty's reign, a period of nearly nine years, he constantly dealt with the lands in question as his private property in like manner as his predecessor had done, and her Majesty Queen Emma was always in the habit of joining with him in deeds to individuals, whenever it was necessary that she should do so in order to bar her dower. On the 30th day of November last, his Majesty died intestate.

Having stated fully all the facts and circumstances which seem to us calculated to throw light on the subject, and to guide the Court in ascertaining the intention of Kamehameha III. as declared in the instrument of reservation of the 8th March, 1848, and in giving a sound construction to the confirmatory act of the Legislative Council, it only remains for us now to announce the conclusions at which we have arrived.

In our opinion, while it was clearly the intention of Kamehameha III. to protect the lands which he reserved to himself out of the domain which had been acquired by his family through the prowess and skill of his father, the conqueror, from the danger of being treated as public domain or Government property, it was also his intention to provide that those lands should descend to his heirs and successors, the future wearers of the crown which the conqueror had won; and we understand the act of 7th June, 1848, as having secured both those objects. Under that act the lands descend in fee, the inheritance being limited however to the successors to the throne, and each successive possessor may regulate and dispose of the same according to his will and pleasure, as private property, in like manner as was done by Kamehameha III.

In our opinion the fifth clause of the will of Kamehameha III. was not necessary to pass the reserved lands to Kamehameha

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IV., any more than the first clause was necessary to pass to him the crown. He was entitled to inherit those lands by force of the act of 7th June, 1848, when he succeeded to the crown, in virtue of the public proclamation made by his predecessor with the consent of the House of Nobles, and he was entitled as the adopted son of Kamehameha III., to inherit the remainder of his estate not devised to any one else, subject to dower.

We are clearly of opinion also that her Majesty Queen Emma is lawfully entitled to dower in the reserved lands, except so far as she may have barred her right therein by her own act and deed. There is nothing in the act of 7th June, 1848, which can be understood as taking away the Queen's right of dower in the lands therein named; nor is there any law of this Kingdom which renders the matrimonial rights of the wife of the King any less than or any different from those of the wife of any private gentleman. Such was unquestionably the understanding of both Kamehameha III. and his successor as to dower in those lands, which are to be dealt with in all respects as private inheritable property, subject only to the special Legislative restriction on the manner of their descent.

But his Majesty Kamehameha IV. was possessed of other property, both real and personal, at the time of his death, not affected with the special character attached to the reserved lands. The descent of that part of his estate must be governed by the general law of inheritance and distribution, and her Majesty Queen Emma is therefore entitled as statutory heir to one-half of that property, after the payment thereof of such portion of the late King's debts as are not specifically charged by mortgage or otherwise upon the reserved lands. Debts of the latter class ought clearly to be paid out of the estate encumbered therewith.

Let judgment be entered accordingly in favor of both the claimants.

Attorney-General Harris, for his Majesty the King.

Messrs. Bates and Montgomery, for her Majesty Queen Emma.

May 27, 1864.

N. B.—Since the above decision the Legislature, by the law of January 3d. 1865, have decreed the lands reserved to the Crown, by the Act of 1848, to be henceforth inalienable and not lawful to lease the same for any term of years to exceed thirty.

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SUPREME COURT—IN BANCO.

OCTOBER TERM—1864.

J. H. CORDING AND J. WILSON *vs.* THE MINISTER OF FINANCE.

AN agriculturist purchasing in bond, articles, included in that portion of the 517th Section of the Civil Code, denominated the Free List, from the original consignee, can not be regarded as the importer of the goods, and therefore not exempted from the payment of the duties.

Justice ROBERTSON delivered the decision of the Court, as follows :

This is an amicable suit, submitted to the decision of the Court upon an agreed statement of facts, under the provisions of Section 1140 of the Civil Code, for the purpose of determining the claim of Messrs. Cording & Wilson, to have a sugar mill and two centrifugal machines entered inwards, at the Custom House, free of duty.

It appears that the sugar mill and machines in question arrived at Honolulu, in the month of August, 1863, on board the schooner "Domitila," and that they were consigned by George Forrester & Co., of Liverpool, England, to Janion, Green & Co., merchants here, by whom, they were entered "in bond." In the month of April, 1864, Messrs. Janion, Green & Co. sold the said mill and machines to Cording & Wilson, "in bond," and the same were then transferred to Cording & Wilson on the books of the Custom House. Cording & Wilson then applied to the Collector-General of Customs, to enter the mill and machines inwards, for use, free of duty, under the provisions of Section 517 of the Civil Code, but the said application was refused, under instructions from the Minister of Finance.

That part of the 517th Section of the Civil Code, being a portion of what is called the Free List, and under which it is claimed that the sugar mill and centrifugal machines, should be permitted to pass inwards free of duty, for home use, reads as follows :

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“Steam engines, sugar, coffee and rice mills, plows, hoes and other implements of husbandry, imported by, or for any agriculturist, or body of agriculturists, for his or their especial use.”

It is admitted on the part of the Government, that Cording & Wilson are agriculturists, within the meaning of the statute; and it is argued on their behalf that they are the importers of the machinery in question, and therefore entitled to enter the same duty free. It is contended by their counsel that the importation of goods, in instances like the present, is divisible into three separate stages or acts, viz: the bringing of the goods from a foreign country to this; the landing of the goods and placing them in bond; and the entry of the goods, inwards, for use or consumption in this Kingdom. It is argued, therefore, that in such cases, the importation is not complete, nor the goods subject to the payment of import duty, till the third or last stage, namely, the entry inwards for use or consumption in this country. In support of this point, counsel has referred to the opinion given by Justice Robertson, on behalf of the Judges, to the Hon. D. L. Gregg, late Minister of Finance, on the 23d June, 1859, upon certain questions which arose out of the ratification of the new treaty with France.

One of the questions put to the Judges by the Minister of Finance on that occasion was this: When the 10th Article of the French treaty, or the new tariff of 1859, goes into effect, will bonded spirits and wines, or other goods, previously imported, be legally subjected to the old or new rates of duty? The answer given to this question was, in substance, that the importer, by his bond, undertakes to pay only the duties to which the goods may be liable at the time they are withdrawn from bond; that so long as goods remain in bond, they have not yet become absolutely liable to the payment of any import duty; that the goods may be reshipped out of the Kingdom, without the payment of any duty; and that, therefore, the importation of goods for home consumption may, so far as the law regulating the payment of import duties is concerned, be regarded as still incomplete while the goods remain in bond.

But that opinion does not cover the questions raised by the case now before us—it is not in point. The question here is not, when shall the importation of goods, for home use or con-

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sumption, be regarded as complete? Under the 517th Section of the Civil Code, there are two questions raised by the present case, viz: first, who must be regarded in the eye of the law as the importer of the articles in question? and, secondly, are those articles liable to duty, or may they be entered free? In this case, the decision of the first question carries with it the decision of the second also; because if the importer is an agriculturist, or body of agriculturists, and have imported the articles for his or their especial use, the articles should be entered free.

There are, speaking generally, three parties, either of whom may be regarded as the importer of goods, in contemplation of law: Firstly, a person residing in this Kingdom who orders or purchases the goods abroad on his own account, and to whom they are consigned here; secondly, a person residing in this Kingdom, to whom goods are consigned by the owner abroad, for sale or otherwise; thirdly, a person who comes here with goods from abroad, of which he is the owner or to whose order they are consigned, and who enters them at the Custom House.

Now, it is apparent that Cording & Wilson do not answer to either of these parties. The articles in question were consigned by the foreign owner to Janion, Green & Co., for sale, and they entered the articles at the Custom House, and placed them in bond to wait for a purchaser. Janion, Green & Co. are, therefore, the importers, within the meaning of the law, and Cording & Wilson are merely purchasers in bond from the importers. The fact that Cording & Wilson assumed the liability for duties, in addition to the price of the articles, does not make them the importers within any recognized acceptance of that term; and they cannot legally claim to have the articles entered duty free.

It may be true, as stated by counsel, that the diplomatic representatives of foreign nations have been permitted to enter, free of duty, goods purchased by them, here, in bond, for their own use; and that a similar privilege has been allowed to the Hawaiian Steam Navigation Company, in the article of coal; but the fact that a lax administration of the law may have obtained in a few instances, affords no guide for the Court. It is our duty, when called upon to decide judicially, to decide

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according to what we believe to be the proper construction of the statute. It should be observed too that the foreign representatives may expect their privilege to be regulated by international comity, and not by the statute.

We order, accordingly, that judgment be entered in favor of the defendant, as of the last day of the October Term.

Mr. Montgomery, for the plaintiffs.

The Attorney-General, for the Government.

October 28, 1864.

SUPREME COURT—IN BANCO.

APRIL TERM—1865.

WILLIAM PUSTAU, *et als. vs.* J. W. RIXMAN.

REMITTANCES and re-shipments of goods made by the assignee of a debtor to the creditor, at the instance of the latter, can not be regarded as items of set-off or payments, so as to prevent the statute bar of limitations from running against the plaintiffs' demand.

The Hawaiian statute, limiting the time for the commencement of actions, contains no provision exempting merchants' accounts from the operation of the usual bar; neither does public policy at the present day require any such exemption.

Evidence of fraud in making the assignment could not be held, upon authority, to prevent the operation of the statute of limitations.

Justice ROBERTSON delivered the decision of the Court, as follows :

The plaintiffs, comprising the firm of Wm. Pustau & Co., of Hongkong, have brought an action of assumpsit against J. W. Rixman, now residing at Koloa, Island of Kauai, claiming to recover the sum of \$21,651 07, principal and interest, alleged to be due them from the said defendant, on account of merchandise sold to him by the plaintiffs.

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The defendant pleads the statute of limitations in bar of the action.

It appears that previous to the year 1857, the plaintiffs furnished merchandise to a large amount to the defendant on credit. The account current presented to the Court, opens with a balance to the debit of the defendant of \$15,679 96 on the 1st of January, 1857.

On the 1st of December, 1857, the defendant executed a special deed of assignment of all his property to Henry Gillingham, in trust, for the payment of the defendant's debt to the plaintiffs. This assignment was formally accepted by the plaintiffs, who executed the deed upon its being forwarded to them, at Hongkong, for that purpose, acknowledged the receipt of money sent them on account by Henry Gillingham, as assignee, and sent him directions to re-ship the silk goods remaining unsold to Hongkong. The plaintiffs also forwarded to the assignee their account current with the defendant, balanced at the 31st December, 1857, with the request that the assignee would have the account examined by the defendant.

It is contended, therefore, on behalf of the defendant, that the items on the credit side of the account now presented, subsequent in date to the deed of assignment, are not payments on account made by the defendant, but remittances made to the plaintiffs by the assignee, as their trustee or agent, and that no transaction has taken place between the plaintiffs and the defendant for more than six years previous to the commencement of this action.

Upon reflection, we are of the opinion that this is a sound position, and that the several items of credit created by the remittances and re-shipments of the assignee, made under the directions of the plaintiffs, cannot be regarded as items of set-off, or payments made by the defendant, so as to prevent the statute bar from running against the plaintiff's demand.

But it is argued on the part of the plaintiffs, that this is an account between merchant and merchant, which has never become a stated account up to this time, but has always remained open, current and mutual, and that, therefore, the Statute of Limitations is not applicable to it.

The Hawaiian Statute which limits the time for the com-

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mencement of actions like the present, differing in that respect from the statutes of some other countries which have been referred to, contains no provision exempting merchants' accounts from the operation of the usual bar ; but it is argued that such accounts should be held by the Court to be exempt, on grounds of public policy.

There is no common law of this Kingdom upon the subject, and we are of the opinion that even if the Court possessed the power to adopt a rule declaring merchants' accounts exempt from the operation of the statute, public policy does not require that we should do so. Such, we think, must have been the view of the Legislature, for while that body enacted a statute of limitations, identical in most respects with the statutes of England and of the American States, to which reference was doubtless had at the time, any provision making an exception in favor of accounts between merchant and merchant, seems to have been intentionally omitted, probably on the ground that, at the present time, when the opportunities of intercourse between this Kingdom and all commercial countries have become so rapid and frequent, there no longer exists any necessity for extending the time of commencing an action based upon dealings between merchants, beyond the ordinary period of six years. The tendency of modern legislation, we believe, in all commercial states, is rather to shorten than to extend the limit as to time, within which actions of any kind may be maintained, with a view to further the speedy settlement of controversies, to give additional facility to transactions affecting the possession and transfer of property, and to promote that repose which is the chief object of all such legislation.

It is argued on behalf of the plaintiffs, that the assignment of his property by the defendant to Gillingham was collusive, and resorted to for the purpose of defrauding the plaintiffs. But there is no allegation of such fraud in the pleadings, and consequently no evidence of it before the Court. And even if there were evidence before us of collusion between Gillingham and the defendant, we are of the opinion that its existence could not be held, upon authority, to prevent the operation of the statute bar against the plaintiffs' demand. (See Broom's *Com. on Common Law*, p. 210, and cases there referred to.)

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In the absence of any common law of the Kingdom, or any provision of the statute to exempt merchants' accounts from the usual bar, and assuming (what is not quite clear) that the account now presented is a mutual, open and current account, without regarding the items subsequent in date to the time of the assignment, we are of the opinion that the plaintiff's action is barred by the lapse of time; and that we cannot hold otherwise without usurping the power which the Legislature alone possesses.

Let judgment of non-suit against the plaintiffs be entered as of the last day of the April Term.

C. C. Harris, Esq., for the plaintiffs.

R. H. Stanley, Esq., for the defendant.

June 19, 1865.

SUPREME COURT—IN ADMIRALTY.

ASEGUT et al. vs. KING et als.

SUBJECT to modification by special contract, owners of vessels, employed as common carriers in this Kingdom, are to be held answerable for the loss or damage of all property shipped for transportation on board of such vessels, unless it shall appear that such loss or damage resulted from unavoidable accident, i. e., the act of God, or the act of a public enemy.

In ordinary cases, the law does not require the adoption of extraordinary measures of precaution; and the master having managed his vessel in what was shown to be the usual proper and seamanlike manner, under the circumstances, was held to have done all that could be required of him, although the vessel and cargo became a total loss.

On appeal from the decision of Justice DAVIS.

Justice ROBERTSON delivered the judgment of the majority of the Court as follows:

This is a suit brought by the libellants, Edward Asegut and Julius Reinhardt, against the respondents, James C. King, William L. Green and Frank Molteno, on the instance side of the Court, in which the libellants claim to recover from the re-

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spondents, the value of 600 kegs of sugar and 70 barrels of molasses, shipped by the libellants in the month of January, 1864, on board of the schooner "Emma Rooke," the vessel of the respondents, which was wrecked at Honoipu, Hawaii, on her passage to Honolulu, and with her cargo totally lost.

The suit was originally brought before Mr. Justice DAVIS, who gave judgment in favor of the libellants, for the sum of \$4,574 08½, from which judgment the respondents appealed to the full Court.

In the adjudication of this cause, two questions are presented for the decision of the Court, viz: firstly, as to the legal rules by which the case must be governed, and, secondly, whether or not the respondents, under the law as declared by the Court, should be held responsible for the loss of the libellants' property.

The common law of England, in relation to the duties and obligations of common carriers, which is the subject involved in this case, has never been formally adopted as the law of this Kingdom, either by legislative enactment or by judicial adoption. It is argued therefore, on behalf of the respondents, that now, when the Court is called upon for the first time to declare the legal rule of responsibility which is to govern and measure the liability of common carriers in this country, we ought not, upon considerations of public policy, to adopt the strict rules of the English common law, but rather some rule more favorable to the ship-owner, based upon the principles of the civil law and the marine ordinances of France, limiting the liability of the ship-owner similarly to the modern commercial laws of Great Britain and the United States of America.

After due deliberation, we have formed an opinion adverse to the view thus contended for. In our opinion, it is wiser for the court to adhere to the rules of the common law of England, the beneficial working of which has been so long tested and exemplified in the traffic of the two greatest commercial States of the world. We accordingly adopt and declare the rule, subject however to modification by special contract between the parties, that the owners of vessels employed as common carriers in this Kingdom, are to be held answerable for the loss or damage of all property shipped for transportation on board

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of such vessels, unless it shall appear that such loss or damage resulted from unavoidable accident, *i. e.*, the act of God, or the act of a public enemy.

Having thus declared the law applicable to the case, we will now proceed to consider whether or not, upon the evidence, the respondents should be held legally liable for the loss of the libellants' property. The main facts of the case will be found carefully and clearly stated in the decision rendered by Judge DAVIS, and we need not repeat them at length. The vessel arrived at the landing at Honoipu, which is formed by an indentation on the coast of Hawaii, about 2 o'clock, A. M., and was made fast to the buoy as is usual, her jib being hauled down and the peaks of her mainsail and foresail lowered. She remained there all the morning, or till near 9 o'clock, A. M. While she lay there the wind was off the land, somewhere from the East to the East-South-East, as the trade winds, which usually blow from about Northeast, do not as a general rule set down till after 10 o'clock, A. M. The weather was good and the breeze moderate. Nearly due North from the buoy there is a point or shoal, at a distance of 104 fathoms, with some rocks merely washed by the water setting out from the point, to within 90 fathoms of the buoy; nearly South-South-West from the buoy is the opposite point of land, at a distance of about 200 fathoms from the buoy, with deep water close up to the shore. Under these circumstances, Capt. Berrill, in getting his vessel under way, determined to cant her bow off to the starboard hand, towards the Southern portion of land, as being the most feasible course of putting to sea. Accordingly the main-boom was guyed to starboard, and the fore-boom to the port side, the helm being put hard-a-port. As soon as the hawser was let go and the vessel's head took the desired direction, the master ordered the jib to be hoisted and the sheet hauled to windward, in order to turn the vessel round to seaward, the peak of the mainsail remaining lowered. When the jib had been partially hoisted, the vessel was struck by a sudden flaw or gust of wind, which caught the jib and fouled it over the lee anchor-stock, so that it could not be got up, nor the sheet hauled to windward as desired, and instead of turning the vessel's head round, the jib, according to the testimony of the witnesses, helped to urge

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the vessel forward on the wind towards the Southern shore. The main sheet was then slacked off to the utmost, and seeing the danger of running on shore, the master let go the halliards of the mainsail and endeavored to get it down, but it stuck against the starboard main rigging. The jib was finally got up, but too late to prevent the vessel from striking, which she did at a point nearly due South from the buoy, and within ten minutes after she had been got under way.

The allegation of the libel is, that the loss of the vessel and cargo resulted from the negligent and unseamanlike manner in which the vessel's sails and rudder were managed, and was in no sense the result of unavoidable accident; and before the libellants can recover, it is necessary that they shall have proved this allegation to the satisfaction of the Court.

After carefully examining and weighing all the evidence, we fail to see that the libellants have made out their case by the proofs. On the contrary, we are of the opinion that, in view of all the circumstances of the case—the early hour of the day, the course of the wind, the greater relative distance of the South point than the North point, from the place where the vessel lay, the fineness of the weather and steadiness of the breeze, as averred and proved by both parties—the weight of evidence shows satisfactorily that the course adopted by Captain Berrill, in attempting to put to sea, was usual, prudent, and seaman-like; and that the fouling of the jib by a sudden and unexpected flaw or puff of wind, preventing the setting of that sail in a seasonable and proper manner, which caused the disaster to the vessel, was one of those occurrences which are usually classed under the head of unavoidable accidents, and styled in legal phraseology the act of God.

Many cases have been cited by the learned counsel in their argument of the cause, and some of them are not essentially different from the case before us. In the old case of *Amies vs. Stephens*, (1 Str. 128) where the master of a hoy attempted to shoot a bridge on the River Thames, but by a sudden gust of wind the hoy was driven on to one of the piers and lost. The decision of the Court was in favor of the defendant, the Lord Chief Justice Pratt, stating that if the hoyman had attempted to shoot the bridge when the bent of the weather was tempestuous,

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and the hoy had been lost, he would have been held responsible. In the case of *Colt and Colt vs. McMechen*, (6 Johnson's R., p. 159,) a sloop beating up the Hudson River against a head wind, ran aground through a sudden failure of the wind, near the highlands. In that case the verdict of the jury was in favor of the defendant, and, upon motion for a new trial, the Supreme Court of New York refused to grant it. In our opinion, the circumstances of the case at bar are far more favorable for the respondents, than those of the case just referred to were for the defendant.

It is argued that the respondents should be held responsible, on the ground that the striking of the vessel on the South point might have been prevented by the adoption of a different course of putting to sea from that which was pursued. It is said that, before casting off from the buoy, the master might have caused both the mainsail and foresail to be lowered down, and, as the wind was blowing off the land, the vessel would have drifted safely out to sea. But there is no evidence tending to show that such a course is usual, or that, under the circumstances, it could be considered seaman-like; on the contrary, the proof is, that such a proceeding would have been unusual and unseaman-like. Again, it is said, the line or hawser, which held the vessel to the buoy, might have been taken from the bow and made fast at the taffrail, so as to have allowed the vessel's head to swing out to seaward, before starting; but there is no evidence before us that such a precaution is ever resorted to by vessels leaving Honoipu, or that such a course is usual or necessary, under circumstances equally favorable with those which existed in the present instance.

As we understand the law, the question is not whether the striking of the vessel could have been prevented by the exercise of extreme caution, or by some mode of proceeding which the ingenuity of man might have devised. Such a doctrine would be unreasonable, impracticable of application, and unsustained by legal authority. The master of the "*Emma Rooke*" having done that which, under the ordinary and favorable circumstances in which the vessel was placed, is shown by the evidence to be usual, proper, and seamanlike, we are of the opinion that he did all that could be required of him; and that the law

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does not require, in any ordinary case, the adoption of extraordinary measures of precaution.

Our decision therefore is that the judgment below should be reversed. Let judgment be entered in favor of the respondents.

C. C. Harris, Esq., for libellants.

Messrs. Stanley and Montgomery for respondents.

June 3, 1865.

Dissenting opinion of Justice DAVIS, on the merits.

This is a suit brought by the plaintiffs, proprietors of a certain plantation in the district of Hilo, Island of Hawaii, known as the Kaiwiki Plantation, on the Admiralty side of this Court, to recover from the defendants, lately owners of a certain schooner called the "Emma Rooke," the value of 600 kegs of sugar and 70 barrels of molasses, alleged to have been utterly lost upon said schooner by her being wrecked.

The lading of the sugar and molasses on board is admitted in the answer. The circumstances of the wreck as gathered from the testimony appear to the Court as follows :

The "Emma Rooke" left the port of Hilo on the 19th of January last, and without touching at any intermediate port, arrived at a place named Honoipu, on the coast of Kohala, Hawaii, early the following morning, made fast to a buoy till near nine A. M., when she cast off, with some portion of her sails set, and within ten minutes thereafter struck upon the rocks to the southward, soon after becoming a total wreck. A disaster so sudden makes all the incidents of anchorage, wind, weather, distances as well as the management of the vessel and the character of the vessel itself, of binding importance in the proper adjudication of the case.

As to the locality, it will be seen from the plan or chart made by Capt. Berrill, and submitted in evidence, that Honoipu is at or near the northwest point of Hawaii ; that it is an indentation of the coast, more like an open roadstead than a harbor or bay, opening wide to the westward.

According to Capt. McGregor, a witness for the respondents, and who assisted Capt. Berrill in making the survey, the usual

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anchorage is close to the buoy, distant from the South point 200 fathoms; but that from the buoy to the nearest shoal to the northward is 104 fathoms, a lot of small rocks, extending from North point merely washed with the water, distant from buoy 90 fathoms. Towards the South point the water is deep to near the shore. He says, he has run many times close to South point in the steamer "Kilauea;" from his statement, it seems the prevailing wind in the morning is off shore, square from the land till about 10 or 11 o'clock A. M., when the trades come down, not generally farther to the North than East-North East over the land. But that the wind is more to the Southward in winter, than any other season, on account of the unsteadiness of the trade winds. "The trade wind in the morning comes down in puffs" till about 10 or 11 o'clock A. M. As Capt. McGregor's statements in this regard are not materially varied, if any, by the other witnesses, and on account of his intimate acquaintance from frequent visits, with the place, I have relied in regard to the winds upon his statements. On the morning of the disaster, none of the witnesses testify that the weather was tempestuous, or the sea rough, or the wind blowing from an unusual quarter; but on the contrary, Capt. Worth states that the weather was good, the usual weather of that region, the ocean not rough. In this, he is corroborated by Makahi, a native seaman on board. Mr. Fisher, the mate, also says, that on leaving the buoy the wind was light and blowing off shore, but increased until they got on shore. Captain Berrill himself states that the wind was off shore, blowing from a point about East-South-East. Now as to the manner in which the vessel was attempted to be put to sea, which is undoubtedly the material question at issue, yet more or less affected by facts to be deduced from other important features of the case, having a bearing upon the main point, I do not propose to follow the entire nautical analysis, made out by the experts, by men whose business from early life has been, either in square rigged or fore and aft vessels, to follow the sea. I must determine, whether from the light they have bestowed, it may be fairly inferred (the state of the winds, weather or of any other facts of a similar character being established to my satisfaction) that

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there was any lack of that prudence, skill or caution on the part of the master, as to make out the essential ingredient of the plaintiffs' case, to be ascertained by the rules of law, as applied by courts of justice to cases of a like nature. It is contended for the respondents, that the management of the sails and rudder, under the circumstances, was just what it should have been, and that the catastrophe was the result of a fortuity against which they could not guard, or in other words that the misfortune was inevitable. As before remarked, I do not discover from the testimony of the witnesses present on the occasion, any material discrepancy as to the wind or weather on the morning in question, when the vessel was cast off from the buoy to be got under weigh, and I proceed at once to examine the evidence, as to the manner in which she was endeavored to be put to sea. Witnesses agree that the foresail and mainsail were up. Berrill says that on casting off from the buoy the main-peak was down; Worth cannot say whether it was down or not; Fisher is of opinion it was never raised at all, although he is not positive as to the exact position of the after sail, as he was occupied forward; Makahi says, the peaks of both sails were slack. From Capt. Berrill's and Fisher's statements, it furthermore appears that the fore-boom was guyed to port and the main to starboard; peak of foresail up, wind being favorable for canting vessel's head to Southward, the helm being put hard to port; that the vessel canted, the order to hoist the jib given, and while the order was being obeyed, the jib was blown over by a gust or puff of wind, and caught over the lee anchor stock, and before it could be cleared and fully hoisted, the vessel struck. As to this mode of getting under weigh, there seems to be some difference of opinion among the experts examined at the hearing. Capt. McGregor, a seaman of long experience, both in square-rigged and fore and aft vessels, lays down the same mode, had he been in command of such a vessel at the time, as that adopted by Capt. Berrill, and says he should not have had the slightest apprehension, but that the vessel would have cleared the land. Capt. Worth, although an old sailor, yet not familiar with schooner sailing, would have hauled the fore-boom to starboard side and the mainsail to port side; as to the placing of the helm and time of

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hoisting jib, it being the intention of the master to cast her head off shore, he does not differ from Berrill, McGregor and Fisher. But his recollection is, that the foresail was on the starboard side, as he would have placed it. Makahi, a native seamen on board and accustomed to sailing in the coasting vessels, and at one time a mate or second mate on board of the schooner "Liholiho," also testifies that at casting off, the mainsail was guyed over to starboard side and foresail to port side, and that the jib was hoisted when the line was cast off; that it was got half way up, became foul; that it was cleared, they hauled again upon it, and before it was quite up, the Captain ordered the jib sheet to be hauled over to windward, which order was immediately followed by another to let go the fore guy; the foresail then went over to the starboard side, and both mainsail and foresail filled, and urged the vessel ahead rapidly. He goes on to state also his experience, derived from service in other schooners, as to the most approved and safest method of getting under way from the buoy at Honoipu, as being in many respects the opposite of what was here adopted, to which it is not perhaps necessary more particularly to advert. He agrees also that the distance to South point was very short, for a vessel of the length and speed of the "Emma Rooke," to run in, after once being fairly under headway, so much so, that according to him, no sails were let down before she struck; that it was attempted to lower the mainsail, but that it became fast to the main rigging, and did not come down; that the vessel went ashore, as the phrase is, with everything standing. Contrary to the opinion of the captain and mate, his idea is, that if at the time the jib fouled, the anchor had been cast and the sails let go, that the vessel would have been held. In this, Makahi is measurably supported by Capt. Worth, whose view is, that if the anchor had been let go when he first saw the danger, that there would, at all events, have been a better chance for saving the cargo, and perhaps the vessel herself. Makahi also indicates two other modes of casting off from the buoy by which the vessel's safety would have been rendered certain; the first, casting off without any sail on at all, by which she must inevitably have floated out to seaward; or if the line had been passed aft to the taffrail and fastened there from the

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buoy before casting off. Both these modes are denounced by Capt. McGregor and Mr. Fisher as being unseamanlike and likely to expose the master to ridicule ; though Capt. McGregor in his cross examination, admits that it is seamanlike to do what is most for the safety of the vessel, and that he would not make sail, where it would add to the vessel's danger. And I merely notice here in passing, that he draws a distinction ; that if a square rigged vessel had been in the situation of the "Emma Rooke," she would have made sternway, and got clear of everything. He also states that the heavy swell spoken of by Fisher is on the rocks, and not at the buoy. Fisher is positive also that could the jib have been got up, the vessel would have cleared the land, and that if the breeze had not freshened, there would have been no trouble in hoisting it. On the other hand it is admitted by the master that it was certainly possible to have got the vessel under way without going on shore ; that if no sail had been put on at all, she must have gone out to sea in safety.

Such I conceive to be the essential abstract of the testimony in this branch of the case. And the all important question here arises before the Court, under the 4th allegation of the libel : was the management of the sails and rudder negligent and unseamanlike ? Before attempting an answer, I desire to dispose of the matter of law involved.

And first as to what is stated in the 1st Article of the libel, that the schooner "Emma Rooke" was engaged in the coasting or inter-island trade of the Kingdom, and during the aforesaid month of January and for a long time preceding had been, and on the said 18th day of January was, a common carrier of merchandise and passengers between the port of Honolulu and the port of Hilo and other intermediate ports and landings on the weather side of Hawaii.

This allegation is answered by the admission on the part of the respondents, that the said schooner, the "Emma Rooke," was engaged in the coasting and inter-island trade of this Kingdom ; but whether or not as a common carrier, these respondents cannot answer, and allege that she did carry merchandise and passengers between the ports of Honolulu and Hilo and other intermediate ports and landings, not only on the weather

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side, but on both sides of the Island of Hawaii, and also to and from ports and landings on the Island of Maui. Without deeming it necessary here to review the testimony on this point, I am satisfied from the proofs, coupled with the above admission, that the "Emma Rooke" was a vessel engaged by her owners in a business which unquestionably in law would fix upon them the denomination of common carriers, liable to all the legal responsibilities which such a denomination incurs.

If such be the character of the trade in which she was engaged, are the respondents in any sense liable for the negligent and unseamanlike management of her master, should it be made to appear, to the extent charged in the 6th Article of the libel, viz: payment for the property lost by the wreck? The general rule of law is clear on this point, and is concisely laid down by Angell in his work on Common Carriers, at Section 91: "In respect to the acts of *agents* and persons in the employment of a carrier, the maxim *respondet superior* applies, and he is equally liable for their acts and for his own." There are well known qualifications to this general principle, to which the circumstances of the present case make it unnecessary to recur. The authority of the master in this instance has not been questioned.

It was argued by the learned counsel for the respondents, that it was not expedient in this country that the common law in this respect should be adopted to its fullest extent; that the Court might mitigate the stringency of the rule. In the case of *La Motte and Dupertail vs. B. F. Angel*, United States Consul, before Chief Justice Lee, (Haw. Reports, vol. 1, page 136), although the question of responsibility was not the direct issue before the Court, yet, in deciding what was then before it, the Court appears to have acknowledged the principle as applicable to our status as a commercial community throughout. The rule of the common law, says Bronsen, J., is founded upon a great principle of public policy; it has been approved by many generations of wise men, and if the Courts were now at liberty to make, instead of declaring the law, it may well be questioned whether they could devise a system which on the whole, would operate more beneficially.

And now as to how far the loss of the vessel may or may not

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be attributed to facts or circumstances beyond the power of the master to control.

The ordinary presumption of the common law is rigid against the carrier in every case in making him responsible, excepting only for those acts that could not happen by the intervention of human means, or against which human prudence and sagacity could not guard. Of the cases cited at the argument, two seem to have been equally relied on as authorities by the learned counsel on either side ; but neither of them, in my opinion, so far as their circumstances are concerned, furnish parallels to the case at bar. In the case of *Colt and Colt vs. M'Mechen* (6 Johnson's R., page 159), the sloop was beating up the Hudson River against a head wind ; from the lateness of the season and the fear of ice, the captain was anxious to reach a place of safety, and to which he had nearly arrived when the accident happened, which was the sudden failure of the wind under the shore, by which the vessel run aground.

The other case referred to in 21 Wendell, page 190, *McArthur and Hurlbert vs. Sears*, was that of a steamboat stranded in entering a harbor in the night time, in consequence of the master mistaking a light upon a stranded vessel for the usual beacon light.

In my opinion, the correct principle to be applied to the present case, is ably and clearly stated by Chancellor Kent, upon the consideration by the Court of a motion for a new trial, in the first of the above mentioned cases ; where, after concurring in the general doctrine that the sudden failure of the wind was an act of God, which could not happen by the intervention of man, nor be prevented by human prudence, yet that a degree of negligence was imputable to the master, and that more caution should have been exercised to guard against such a probable event as the want of wind to bring his vessel about. The failure of the wind in that case, is likened unto the sudden puff or gust by which the jib was fouled over the lee anchorstock in the case at bar, and argued to be the sole cause of the calamity.

According to the testimony, sudden puffs of wind were ordinary occurrences at or about that time of the day, at the coming down of the trade winds.

It was not one of those extraordinary events against which no human diligence and foresight could guard.

Again, it is shown that the "Emma Rooke" was a vessel of unusual speed, when impelled by even light winds, and considering such to be the character of the vessel, I think there was a want of caution in having any after sail set, which might tend to urge the vessel's bow up into the wind, regarding also the length of the vessel and the distance between the buoy and the south point, to be for a vessel of her qualities as extremely short, and which is further shown by the very few moments which elapsed from the time the vessel was released from the buoy to the time when she struck. The Captain himself says in reply to a question put by plaintiff's counsel, that even with the mainsail off, helm hard up, jib-sheet to windward, fore-boom guyed to windward, that the vessel would pay off rapidly but still be making headway and not go astern, if wind was abeam or abaft abeam.

Two other methods of getting under weigh are pointed out by the testimony, by which the vessel's safety would have been secured.

I do not purpose to discuss their respective merits; they have been sufficiently adverted to in the recapitulation of the evidence.

But it is furthermore testified to by the master, that it was certainly possible to have got the vessel under weigh without going ashore; and if such be the state of the case, is it possible for the Court to adjudge that the loss of the vessel was the result of inevitable accident, or of circumstances beyond the skill, caution and foresight of the master to have controlled? Upon a careful consideration of the facts and law of the case, I am of opinion that it was not.

The error of judgment, was the bringing of the vessel into such a position that the mere fouling of the jib within so limited a distance, by the puff or gust of wind, rendered it impossible to adopt any other course under so sudden an emergency to ward off the disaster. I should have regarded the case differently, had it been that of a vessel obliged to beat through a passage or channel way in order to regain the open sea, and disappointed suddenly by a change of wind, or a failure thereof;

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for in such a case, the making sail and a certain reliance upon the steadiness of the adverse wind is of the essence of the undertaking, namely, to get out of port, but the circumstances of the present case, as shown, were different.

Under this view, and that by the acknowledged rule of law, the respondents are liable for the acts of their agent, the master, when acting in the scope of his duty, my judgment is, that the respondents pay to the libellants the net value at this port of the produce lost by the wreck, which, according to the computation made, with the assistance of the Clerk of the Court, I have ascertained to be \$4,574 08½.

Let judgment be entered for the libellants for the above amount and costs.

C. C. Harris, for libellants.

John Montgomery and R. H. Stanley, for respondents.

SUPREME COURT.

OCTOBER TERM—1865.

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A VERDICT on one count, although silent as to the others, is an acquittal as to them ; but the jury should respond distinctly as to all, as being a more precise mode of proceeding.

As is provided for by statute, the jury may return a verdict for any lesser degree of the same offense, when the evidence will not warrant a verdict of guilty in the degree for which the prisoner is indicted. The proof however must sustain the charge of the lesser degree.

Motion for arrest of judgment and new trial.

ALLEN, C. J.

This is an indictment for burglary with intent to commit robbery, larceny or other felony, with allegation of larceny ; also

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for larceny in the second degree in the night time ; also for being accessory to the crimes of burglary and larceny.

This case was submitted to the jury and a verdict of guilty of larceny in the third degree rendered. After which, the counsel for the defendant moved in arrest of judgment and for a new trial, on the ground that the verdict was against law and evidence.

The counsel for the defendant contends that the verdict is void for uncertainty, as it does not acquit the defendant of the count of burglary and being accessory to burglary, and that he is not protected by this verdict from a prosecution for burglary.

The authorities do not concur as to the effect of a verdict on one count, without reference to the others. The earlier decisions were in favor of the position that it was bad to find a part of the matters put in issue, and to say nothing of the rest. It is also decided in the case of *Baron, plaintiff in error, vs. The People, defendants in error* (1st vol. Parker's Crim. Rep., 246), that if some of the counts are undisposed of by the verdict, the judgment rendered on such verdict will be reversed.

In the case of the *State vs. Phinney* (24th Maine, 384), the Court are of opinion when there are several counts, and the jury find the defendant guilty on one count, and are silent as to the rest, the legal effect of the verdict is an acquittal as to the others ; but they say that the accused is entitled to a verdict upon each and every substantive charge in an indictment, and it is the duty of the Court to require the jury to respond distinctly to the several counts contained therein.

In the case of the *Commonwealth vs. Steadman*, (12 Met., 444,) there were six counts in the indictment, charging the defendant with selling spirituous liquors. The jury returned a verdict that the defendant was guilty of the charge contained in the third count, and stated that they had not agreed as to the other counts. The Court in this case held that the Attorney of the Commonwealth, with leave of the Court, might enter *nolle prosequi* as to the other counts, without the defendant's consent, and that the judgment might be rendered on the third count.

Other Courts have held to the same direction, and adopted

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the same practice. *United States vs. Keene*, (1 McLean, p. 429 ; Bishop's Criminal Law, §677.)

We are of opinion that the verdict should not be set aside from this cause, as it is clearly understood in our practice, that a verdict on one count, although silent as to others, is an acquittal as to them. Still, we think the jury should respond distinctly as to all, as being a more precise mode of proceeding.

The counsel for the defendant contends further that the verdict is against the evidence.

The evidence introduced to sustain the charge of larceny, was that it was committed in the night time.

There was no conflict on this point. It conformed precisely to the count in the indictment. A verdict of guilty of larceny in the third degree was rendered, which by reference to the third subdivision of the 15th Article of Chapter 16th of the Penal Code, it will be seen that it was a verdict of larceny in the day time ; the charge was larceny in the night time ; the proof was exclusively applicable to the act being done in the night time, but the verdict was guilty of larceny in the day time.

This is clearly against the evidence. But it is said that the jury may return a verdict for any lesser degree of the same offence ; this is provided for by statute, when the evidence will not warrant a verdict of guilty in the degree for which the prisoner is indicted. The proof, however, must sustain the charge of the lesser degree.

In this case it is not sustained. There is not a particle of evidence that the defendant was guilty of larceny in the third degree.

The indictment alleges that the defendant feloniously stole four dozen bottles of spirituous liquors, the property of Mr. W. L. Green, in the night time. Yet, the verdict as rendered by force of the provisions of the third subdivision of Section 15, as referred to above, is that the alleged larceny was committed in the day time. Suppose for example that the charge was in the night time. The proof being in the day time, it will not be contended that it could be sustained. We regard this case as equally strong. The jury have rendered a verdict of guilty for a charge that was neither made nor proved—larceny in the

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day time. The penalties are different. In the former case, the punishment is imprisonment at hard labor for a period not more than five years and a fine, and in the latter not exceeding two years with a fine.

In the case of the Commonwealth *vs.* Hopkins, (3 Met., 460,) it was determined that evidence of the commission of larceny in the night time, would not support an indictment for larceny in the day time.

We regard the principle of that case as decisive of the question raised in this. In that case the evidence did not support the allegations in the indictment. In this case while the proof sustains the indictment, the verdict is in conflict with both.

In the case of the Commonwealth *vs.* M'Laughlin, (11 Cush. Rep., p. 598,) the Court says that the Legislature by special enactment in the case of aggravation, or as they are sometimes called compound larceny, have made time and place essential elements of the several offences for which punishments are prescribed. In that case the averment was that the larceny was committed in the day time, and the Court say, as the evidence tended to prove that the offence was committed in the night time, that it did not sustain the indictment. The Court, however, say that the defendant might have been found guilty of a simple larceny.

We are of opinion that the evidence adduced by the Crown in this case, was sufficient to have warranted a conviction of the defendant of simple larceny upon the present indictment.

Judgment arrested and new trial ordered.

Mr. C. C. Harris, Attorney-General, for the Crown.

Mr. Stanley, for defendant.

October 12th, 1865.

Rex vs. Gillingham.

SUPREME COURT.

REX vs. GILLINGHAM.

ALLEGATIONS as to time and place of the commission of an offense should be made with greater certainty before the appellate tribunal (the Circuit Court) than may be required to be shown upon the record of the District Magistrate. The Court regard the proceedings of an appeal from a District Justice with less technical precision than on an indictment.

In an indictment for selling spirituous liquors without license, the burthen of proof is on the defendant to show that he had a license.

Before Chief Justice ALLEN and Mr. Justice DAVIS.

ALLEN, C. J.

This case came before us upon exceptions taken to the opinions of and direction of the Circuit Court of the Fourth Judicial Circuit.

The counsel for respondent makes certain exceptions. *First*, That the Court erred in denying the motion to quash the conviction, before the District Justice of the District of Koloa, Island of Kauai, on the ground that there was nothing on the record, sent up by said Justice, that showed the time when, or the place where, the alleged offense was committed. By adverting to the 919th Section of the Civil Code, it will be seen that the District Justice has fully complied with its requirements. The Section is as follows: "Every District Justice shall have all the necessary powers in and for the administration of justice in all cases coming within his jurisdiction. He shall not be confined to forms, nor shall he be compelled in any case to preserve any other record of his proceedings than the mere conclusion, determination, or judgment at which he may arrive."

It was a proper matter of argument before the Magistrate, whether the Government had proved the offense to have been committed on any particular day, or at any place within his jurisdiction. For the purposes of a trial before the Circuit Court, the record was all that could be required of the District Justice.

While the Court is of opinion that the Magistrate did all that the law required of him, it was the duty of the Attorney-Gen-

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eral to make his allegations more precise, and from the record of the Circuit Court it appears that he did, for he charged the defendant with having from the 1st day of January, 1864, to the 11th of June, 1864, vended spirituous liquors, without having obtained a license, to various and divers persons at Koloa, Kauai, in violation of law, and proof was adduced satisfactory to the Court of sufficient precision as to time and place of vending, for the testimony of one of the witnesses, a Hawaiian, was that he purchased two bottles of ale on New Year's Day in 1864. There was other testimony of selling spirituous liquors at various times, but not fixing the precise day, but approximating to it. The Court regard the proceedings of an appeal from a magistrate with less technical precision than on an indictment.

The counsel contends further, that the Court erred in deciding that the District Justice at Koloa had summary jurisdiction to convict under the law with a violation of which defendant was charged.

By the Constitution of 1852, the right of trial by jury in all cases in which it has heretofore been used in this Kingdom, shall remain inviolable forever.

By the law of 1846, which authorized the Minister of the Interior to grant to the highest bidder licenses to retail spirituous liquors, a condition was inserted in the bond, that he would not violate any of the conditions of the license, but if he did, upon proof being made to the satisfaction of a common magistrate, without the intervention of a jury, the penalty of five hundred dollars would be incurred.

By the law of 1847, which was passed to regulate the sale of ale, beer, &c., there was a provision for the violation of the law, that upon conviction before any Police or District Justice, a fine of five hundred dollars for the offense might be imposed.

By the law of 1860, jurisdiction was given to the District Justices and the Police Magistrates to hear and determine, subject to appeal, all complaints for any violation of the license law, without limit in respect to amount of penalty to be imposed for such violation.

From these provisions it is very evident that the usage has been to try complaints of this character without the interven-

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tion of a jury. The history of judicial proceedings fully sustains this position.

The counsel contends further, that the verdict was contrary to law and evidence, that the respondent had not a license to vend spirituous liquors.

The case of *Commonwealth vs. Thurlow* (24 Pickering's, page 374), was cited as an authority to sustain this position. This Court in this case say that it is incumbent upon the Government to produce *prima facie* evidence that the respondent was not duly licensed. This decision was made in accordance with what the Court regarded as the requirements of the Statute of Massachusetts.

The licenses there are granted by the County Commissioners. and the Clerk of the Judicial Courts is also Clerk of the Court of County Commissioners, and it is made his duty to make a record of the proceedings of all the Courts of which he is clerk, and has the custody of all the records. The authority to retail ardent spirits is the order of that Court, or, the record of that order is the only legal evidence of it. This is a strong illustration of the importance of examining the peculiar statutes of a country, as controlling the decision of their Courts.

In the first volume of Greenleaf's Evidence, Section 19, it is declared that when the subject matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true unless disproved by that party; such is the case in a civil and criminal prosecution for a penalty for doing an act which the statute does not permit to be done by any persons, except those who are duly licensed therefor, as for selling liquors, exercising a trade or profession. In Harrison's case, reported in Roscoe's Criminal Evidence, p. 56, in an information for selling ale without license, it was held that the informer was not bound to produce evidence that the accused had not a license. In *The State vs. Gening*, 1 McCord, p. 573, in an indictment for selling spirituous liquors without a license, it was decided that the burthen of proof was on the defendant to show that he had a license.

Starkie in his treatise on evidence says (vol. 1, p. 376,) upon a penal action for sporting without qualification, it is incumbent on the defendant to prove his qualifications. There is,

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undoubtedly, some conflict of authorities on this question; but the general doctrine is, that in prosecution for a penalty for doing acts which the statute prohibits, excepting those who are licensed therefor, there is no presumption that permission had been duly obtained. The respondent can easily produce his license if he has one.

The Court are of opinion that the objection, that no proof was offered by the Crown, that the respondent was not licensed, cannot be sustained, and that the license must be shown by the party claiming its protection. But in this case a statute positively interdicts the grant of a license for the retail of spirituous liquors in all other parts of the Kingdom except Honolulu. Therefore, no legal license for retailing could be shown for Koloa. There was no person authorized to issue a license, and hence to require evidence that a license prohibited by law was not granted, would be carrying the law of evidence of proving a negative averment to an extreme.

Exceptions overruled.

Attorney General, for the Crown.

Mr. Stanley, for respondent.

November 15th, 1865.

SUPREME COURT.

R. E. WAKEMAN *vs.* KALAMA HAKALELEPONI.

A PAROLE agreement to take charge of a plantation for three years, alleged to have been made with the plaintiff by the defendant's agent, the latter to find all monies, required to carry on the business, said monies to bear interest from date of payment, and at the end of the three years, the sums advanced and interest to be paid back to defendant, plaintiff receiving one-half of the balance of receipts as his wages: Held to be an agreement not to be performed within a year and, therefore, such as the statute of frauds (Sec. 1053, Civil Code) declares invalid to found an action upon at law, unless it be in writing, etc.

Such an agreement, unattested by any writing signed by the plaintiff, can not

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form a ground of defence to a suit for services rendered, based on a *quantum meruit*.

The defendant who, with every opportunity for observing the mode of cultivation pursued by the plaintiff upon the estate, which is shown to be unprofitable, retains him in employ for a long period, can not resist his claim for *some* wages on the ground of inefficiency.

Held; that by permitting the plaintiff to remain for such a length of time, he accepted his services such as they were, their value to be measured as nearly as possible by the nature and extent of the services rendered.

Judgment of the Court per Justice DAVIS. Referred to the Court without the intervention of a jury, by consent of both parties.

The plaintiff in this action claims of the defendant the sum of \$3,237 for work and labor performed in and upon a certain plantation called the "Kaneohe Plantation," on the Island of Oahu, at her special instance and request, and for divers materials provided for the use of said defendant in and about the said plantation. Under a further count the sum of \$327 30 is claimed for monies paid out and expended by the said plaintiff for the use of said defendant, for the business of the aforesaid plantation. The complaint sets forth that the services rendered, extend over a period from on or about the 8th day of September, 1862, to the 20th day of April, 1865.

- The defendant answers by a plea of the general issue to the allegations of services performed by the plaintiff, and also by a special plea denying any authority or request to the plaintiff to pay out or expend the sum of \$327 30 for her use, and on the contrary avers that she has committed to the plaintiff, since the 1st of November, 1862, a large sum of money, amounting to many thousand dollars, exceeding ten thousand dollars, to be expended on the Kaneohe Plantation.

At the hearing plaintiff's counsel admitted receiving from defendant cash amounting to \$8475 60, but which had been disbursed for the plantation, besides a further sum of \$249 39. It was also admitted by defendant's counsel that the account rendered by the plaintiff showed the money actually expended for disbursements of the plantation as therein set forth.

In support of the claim for services performed, the plaintiff produced a number of witnesses to the effect that they had seen the plaintiff engaged on the plantation at Kaneohe, from

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the latter portion of the year 1862 till about March or April of the year 1865, as an overseer or superintendent of the plantation, having a number of native hands, 20 or 30, employed under him; that his first work was the putting up of buildings, then the cultivation of rice, raising two crops; that subsequently he commenced the cultivation of sugar, about 100 acres of cane being planted, according to one witness, between August 1863 and January 1864, with the exception of 10 acres planted previous to the first named date, in a field on the side of the road, mauka—said field containing about 30 acres.

It was testified also by Mr. Wilder, a witness who has been engaged in the business of sugar planting for four years, and who is at present proprietor of a sugar plantation at Kualoa on the windward side of this island, that \$100 per month with a house and ordinary expenses paid, is a good price for an overseer, and that he should be an efficient man to merit such a compensation; that he has employed on his estate 150 men and women, and had 200 acres of cane under cultivation. Other witnesses testified that larger sums had been paid or offered to competent parties on more extensive plantations than the present, where large numbers of laborers, from 140 to 160, are employed, and large tracts are under cultivation, and in instances where other duties, such as that of engineer or sugar boiler during the season, were added to that of ordinary overseer or manager. Fifty dollars (\$50) with house rent and other expenses, such as beef and vegetables raised on the plantation, was mentioned as having been recently paid to the overseer on the plantation of Kaalaea, in the neighborhood, who is represented as being an industrious man.

By the testimony of C. C. Harris, sworn for the defendant, it appears that the plaintiff went on to the plantation at Kaneohe in the latter part of October, 1862, that he, Harris, was to act as agent for this defendant in the management of a large amount of personal property belonging to her, and likewise to conduct and manage her estate at Kaneohe, it being the intention at first to establish a rice plantation, and testified also, that an agreement was made with the plaintiff to the effect that he was to take charge of the plantation for three years next succeeding November, 1862, the defendant's agent to find the neces-

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sary funds, all amounts bearing interest from the date of payment. At the expiration of the agreed term, the plaintiff was to receive for his services one-half of the balance of the receipt of the products of the estate after payment of the sums advanced and interest thereon.

At the trial, plaintiff's counsel objected to any evidence being received touching the above agreement, as such an agreement by its terms was contrary to the statute of frauds, to the soundness of which objection we shall presently advert.

The witness furthermore states that the cultivation of sugar began in July, 1863, by the plaintiff, with no intention on the part of defendant's agent of starting a sugar plantation, not even with his command, request or consent other than permission. The cane was planted at first in patches, as it were, experimentally, and at the close of March, 1865, there were about 71 acres planted, not including a tract of 39 acres planted under a contract by a third party. The agent of the defendant claims that all this work was done under the contract above stated by him, with the most ample understanding and cordial co-operation of this plaintiff, as often admitted by him in presence of witnesses; in short that he was working on shares. In the latter part of 1864 and beginning of 1865, differences appear to have arisen between the defendant's agent and the plaintiff as to the outlay of any further expenses on the estate, the former having expended a large sum, amounting at the close of 1862 to \$7,000 or \$8,000—the laborers refusing to obey his, the defendant's agent's, orders regarding work to be done in the fields.

On the 18th of March, 1864, a separate party was engaged to superintend the mill-house by defendant's agent, and subsequently, the plaintiff stated to him he should not go back to the place till a settlement was had with him, but that he was ready to leave, if so desired by the defendant, and the result was that the defendant's agent obtained a paper or authority in writing from defendant giving the full control over the place, which on being shown to plaintiff, he said he would not work under him, the said agent, and finally quitted, and Joseph Emerson was employed on the 20th of April as overseer, but the testimony shows that Wakeman was leaving for some time, as it were, and by degrees before he left altogether, absenting himself from the

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plantation, and leaving general orders with the laborers that they were to obey no commands from any other parties.

According to Emerson's testimony, the condition in which Wakeman left the plantation indicated bad farming, the fields were overrun with grass or sod, indigo, and castor oil plants, so that great labor was required to reclaim them and recover what cane had been planted, which was of very small size. The plowing or furrowing had been done in such an unskillful manner as to render irrigation difficult, if not impossible. Mr. Emerson's statements are corroborated by Dr. J. Mott Smith, who frequently visited the plantation during Wakeman's administration, who says also that he would not have invested a dollar with such cultivation as he saw on the plantation; heard Mr. Harris often remonstrate regarding the style of the work carried on, and that nothing was done as he, Harris, desired. There was no good prospect for a ratoon crop. Has heard Wakeman in conversation with defendant's agent, claim that he was a partner or share-owner in the sugar planting operation, but never asked for monthly wages. The comparison in the mode of cultivation, as between the present and former overseer, regarding the future, is much in favor of the present one, and bespeaks far better prospects for the plantation.

It therefore appears that the plaintiff's claim is resisted on two distinct grounds. First: That he embarked in the operation under a contract or agreement, that the remuneration he should receive was to depend, in effect, upon the success of the undertakings, to be derived either from the cultivation of rice, (or perhaps some other product to be raised on the estate) which was abandoned after a few months, and sugar growing entered into, mainly, by the defendant's showing at the instance of the plaintiff himself. If this be a valid and subsisting contract, the plaintiff has nothing now to receive, for the benefits from the rice did not pay expenses, and the sugar, up to time of plaintiff's quitting, has not been sufficient to yield any profit over the large outlays.

This position was conceded by the argument of plaintiff's counsel. But the plaintiff repudiates any such contract and bases his claim upon a *quantum meruit* for services rendered. And in reply to the latter, the defendant denies her liability to

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make compensation for plaintiff's services, on the ground of their inefficiency and his want of proper cultivation, care and good management of the estate, which constitutes the *second*, and as we regard it, main ground of the defense.

The issue between the parties being so clearly developed upon the testimony and the pleadings, it remains for us to announce the conclusions to which we have been led by the testimony. As we regard the contract testified to by Mr. Harris, if valid, to be a bar to the plaintiff's claims, before proceeding further, it becomes necessary to adjudicate upon it. The statute referred to, and upon which plaintiff's counsel rests his objection is at Section 1053 of the Civil Code, under the caption, Chapter 20, "Of the prevention of Frauds and Perjuries in Contracts and in Actions founded thereon," and reads as follows :

"SECTION 1053. No action shall be brought and maintained in any of the following cases ; *first*, to charge an executor or administrator upon any special promise to answer damages out of his own estate ; *secondly*, to charge any person upon any special promise to answer for the debt, default or misdoings of another ; *thirdly*, to charge any person upon an agreement made in consideration of marriage ; *fourthly*, upon any contract for the sale of lands, tenements, hereditaments, or of any interest in or concerning them ; *fifthly*, upon any agreement that is not to be performed within one year from the making thereof : unless the promise, contract or agreement upon which such actions shall be brought, or some memorandum or note thereof shall be in writing and be signed by the party to be charged therewith or by some person thereunto by him lawfully authorized."

Mr. Harris, the main witness to the alleged contract, expresses himself, while speaking of it, in these words : "Plaintiff agreed to take charge of the plantation for three years, next succeeding November, 1862, I to find all the money, and all amounts that I paid were to bear interest from date of payment ; at the end of three years the sums then advanced and the interest were to be paid back to defendant, and Wakeman was to receive one-half of the balance of receipts as his wages—the rest would be defendant's profits." So that the agreement was not to be performed within a year. It contemplated the embarking in an

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enterprise which was not to be accomplished till the expiration of three years. At the end only of three years, says the witness, was there to be any settlement, then only the balance sheet was to be struck, outlays and interest repaid, and Wakeman to receive one-half of the balance of receipts as his wages. In the meanwhile it was a continuing engagement on the part of the plaintiff to go on and do the best on the estate for the benefit of both parties, and disbursements and receipts were to be wound up at the end of three years.

We regard this such an agreement as the Statute declares invalid to found an action upon at law, unless it be in writing and "signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized." And we are also of opinion that such an agreement, unattested by any writing signed by the plaintiff, cannot form a ground of defense to the present action, or else it might very properly have been made the subject of a special plea in bar to the merits of a suit based as this is on a *quantum meruit*. Therefore the more serious question for us to consider is the ground of services. Have any been performed worthy of compensation? And if so, what is a fair valuation for them, as based upon the testimony, that the defendant should pay? As to the length of time that the plaintiff remained on the plantation there is no conflict worth considering. As to the exact degree and quality of the service alleged to have been performed, we regard the plaintiff's testimony as somewhat meagre. True, it appears he was the general overseer of the laborers, twenty or thirty hands. The land was uncultivated when he went on to the place; he worked it at first for rice, obtaining two crops, which Mr. Severance states amounted net to \$1,219 11, with \$827 58 to be added for a quantity sold to Mr. Prendergast, less cost of cleaning.

Then he planted sugar cane, as one witness testified, to the extent of 100 acres, but as defendant's agent states only to 71 acres, and this, from the particularity of his estimates of the areas of the different lots, we think to be more correct, and this in separate small lots; leaving the cane in such a state that no ratoon crop could be expected, and the entire plantation under such an imperfect condition of culture as to demand great labor for its future improvement from the incoming over-

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seer. The whole proceeds of sugar and melado amounted to \$4,618. Added to this, during the last months of plaintiff's incumbency, there was a want of that co-operation and accord between the defendant's principal agent and himself, which is so essential among the parties interested in the successful prosecution of any important undertaking, and which so far as the evidence tends, might be attributable to a failure of unanimity of purpose between the parties as well as to any neglect on the part of the plaintiff.

As to wages paid to overseers generally on the plantations, the evidence is sufficiently clear and explicit, but how far the Court can be guided by these prices, in a case like the present, is not, perhaps, so easy to determine.

If it be conceded that the plaintiff was merely employed on wages, and his administration unprofitable during the long period assigned by the defendant, it is somewhat surprising that he should have been retained so long without settlement and discharge by the agent of the defendant, or that the plaintiff should have been allowed to pursue a system of cultivation, which, long previous to his quitting, was showing itself to be disastrous. Although we might here remark, that daily experience demonstrates that agricultural operations of this nature, whether on a large or small scale, are seldom expected to be remunerative in the first two or perhaps three years. The receipts are not looked for to fully compensate the large outlays necessary to their commencement during this time, so that if the amount of compensation were to depend as under an agreement, as before stated, the plaintiff certainly could have nothing to receive, but would probably have something to pay over to the other party. And this is one reason why it is difficult for us to believe that these parties could have contemplated any settlement of gains, or even losses, as accruing at the end of the year, under the supposition that the agreement was from year to year, in order to bring it within the statute. That this plaintiff has not been the most efficient of overseers is unquestionable, but the Court would hesitate before dismissing his suit, as one entirely unworthy of any compensation whatever from the defendant's hands. He seems to have had her confidence sufficiently to entrust him with a very considerable

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amount of her funds, through the hands of her agent, by whom it is shown that he plowed 71 acres of ground ; by another witness that he was engaged in the erection of buildings for the beginning of the enterprise, besides the subsequent planting of rice and cane, the latter not planted in a skillful or farmer like manner, but as to the rice there is no evidence before us but that the cultivation of that was good, although it did not yield a profit, a result, unfortunately, not unusual in this country in some agricultural enterprises. Added to this, Mr. Harris, the defendant's agent, was constantly visiting the plantation with every opportunity to observe, from time to time, the progress and manner of operation by Wakeman, and, for aught we perceive, might have interposed and instituted a more profitable system of cultivation, as he says he had all to do with the plantation ; from his testimony, we infer, as much so, as if it had been his own.

It is true, these points of the plaintiff's case are met by very reliable testimony, to show the neglectful manner in which the cane was planted and allowed to be overgrown, planted in such a way as in a great measure to lose the benefit of irrigation, and without prospect of any subsequent ratoon crop. This testimony has not been rebutted by the plaintiff. But the defendant's agent, notwithstanding these facts, kept the plaintiff in his employ, incompetent as he says he was ; continued to make large advances for Wakeman to disburse, until they became so large that he declined to go further. This retaining of the plaintiff in employ under all the circumstances of the case, which have been detailed, is the principal reason why we are of opinion that the defendant is put in a position, to be rendered liable for the payment of *some* wages to the plaintiff. He has, by permitting him to remain for so many months, accepted his services, such as they were. And therefore, whatever compensation the Court shall award him, should be measured as nearly as possible by the nature and extent of the service rendered as eliminated from the whole testimony produced on both sides.

From the view we take of this case, as above expressed, we have decided to award the plaintiff a compensation based upon a rate of wages much lower than the lowest wages mentioned

Will of Nanino.

for an overseer, which we fix at \$20 per month, for the time he remained at Kaneohe, say thirty months, being \$600 and \$59 balance due on his accounts as was admitted and agreed upon after the allowances were made between the counsel, with \$56 for the articles sent over to the plantation, as we understood, with the knowledge of defendant's agent, making in all \$715 with costs of suit.

Let judgment be entered accordingly for this amount and costs in favor of the plaintiff, as of the last day of the October Term.

R. H. Stanley, Esq., for plaintiff.

C. C. Harris, Esq., for defendant.

SUPREME COURT—IN PROBATE.

IN THE MATTER OF THE PROOF OF THE WILL OF NANINO, DECEASED.

THE provisions of Section 1474 of the Civil Code, limiting the time for the probate of wills, have no reference to the wills of testators deceased prior to the passage of that law, and the limitation therein imposed, does not apply to them.

At Chambers, before Chief Justice ALLEN and Justice DAVIS.

The will of Nanino was presented for probate before Mr. Justice DAVIS, on January 21st, A. D. 1865; it was dated and executed in December, 1855, and it appeared in evidence that the testator died on the 6th of January, 1856.

Wherefore the Court ruled, that as more than five years had elapsed since the death of the testator, and since the passage of the law, the will could not be admitted to probate, as by the Civil Code, "No written will shall be allowed to be proved after the expiration of five years from the death of the testator."

From this decision the petitioners appealed.

It is contended that the provisions of the Civil Code do not operate as a limitation, as by its terms it does not apply to the

Will of Nanino.

case at bar, and if it did it would have a retrospective operation, which is interdicted by express provisions of the Code.

Prior to the statute referred to, there had been no limitation to the admission of wills to probate.

Mr. Justice Tenny in the case of *Givin vs. Mann*, 27 Maine Reports, p. 223, says that "no statute is to be held retrospective, as in violation of any constitutional provision, when it affects rights, unless such shall be the necessary construction." What is the necessary construction of the statute in question? Admitting that the Legislature had the power to pass a statute of limitation as to the proof of wills made prior to its date, does this statute in its terms so declare? If it applies to the past, it would be very unequal in its operations, as the time of limitations is computed from the date of application for probate retrospectively to the death of the testator. In some cases it might be a day, and in others five years, or any time intermediate. Had the Legislature intended that the act should apply to wills where the testator had deceased, there would doubtless have been inserted some provisions giving the same term of five years or some precise time for that class of wills presented for probate. In the statute of limitations applicable to personal actions, the legislation has been as follows, viz :

On the 1st day of August, 1853, an Act took effect, limiting the time of commencing personal actions, with the express provision that it was not to apply to any action commenced, nor to any causes where the right of action shall have accrued before the time when this Act took effect as a law ; but the same shall remain subject to the law now in force. By the Civil Code, there is a provision that in all cases where the right of action shall have accrued prior to the 1st day of August, 1853, no action shall be maintainable, unless the same shall be commenced before the 1st day of August, 1859. In this legislation, as much time has been given to the debts contracted prior to 1853 as those contracted subsequently. The provisions in question have reference to wills made subsequent to the passage, and that in its terms it has no reference to the past, and therefore, whatever the rule might be, had the limitation been made applicable to them, as it was not, it only applies to the future, and therefore does not impose the limita-

Will of Nanino.

tion on the will in question. There were other points presented to the Court, in a very creditable manner by the counsel for petitioner, but it becomes unnecessary to consider them, as the judgment of the Court of Probate is hereby reversed, and the case remanded to said Court for hearing.

December, 1865.

RULES
OF
THE SUPREME COURT
OF THE
HAWAIIAN ISLANDS,

MADE IN ADDITION TO THOSE ALREADY PUBLISHED IN
THE 1ST VOLUME OF THE HAWAIIAN REPORTS.

OCTOBER TERM, A. D. 1857.

IT IS HEREBY ORDERED, That any party, plaintiff or defendant, or the counsel of any such party, wishing to withdraw from the files any document which may have been presented by him as evidence, during the trial of his cause, shall be at liberty to do so upon filing with the Clerk of the Court a certified copy of the original, together with a receipt for the same. And in case judgment shall have been rendered upon any document so withdrawn, the Clerk shall certify that fact upon the back of both the original and the copy.

By order of the Court.

JOHN E. BARNARD, Clerk.

APRIL TERM, A. D. 1858.

IT IS HEREBY ORDERED, That in every case of a motion to the Court, or to a Judge at Chambers, to set aside an award made by referees under a Rule of Court, and for a new trial of the cause, it shall be incumbent upon the party making such motion to give the opposite party at least forty-eight hours previous notice thereof, in writing, setting forth also the grounds upon which his motion is based.

By order of the Court.

WILLIAM HUMPHREYS,
Clerk, *pro tem.*

OCTOBER TERM, A. D. 1858.

IT IS HEREBY ORDERED, That any party to a civil suit pending in this Court, may apply to the Court, in Term time, or to any Justice thereof in vacation, upon affidavit, giving the opposite party forty-eight hours previous notice of such application, for a commission to take the testimony of any material witness, to be used at the trial of the cause, where such witness is about to quit the Kingdom, or is so ill that it is feared that he will not live till the day of trial.

By order of the Court.

JNO. E. BARNARD, Clerk.

APRIL TERM, A. D. 1859.

IT IS HEREBY ORDERED, That in any civil cause hereafter to be commenced in this Court, in which the defendant shall intend to avail himself of the Statute of Limitations as a bar to the action, it shall be incumbent upon such defendant to file written notice thereof, with the Clerk of the Court, within the time allowed for filing an answer. But the Court, or a Judge at Chambers, will, in their discretion, and upon proper cause shown, permit such notice to be filed after the expiration of the time for filing an answer, with or without terms, as shall be deemed just.

By order of the Court.

JNO. E. BARNARD, Clerk.

JULY TERM, A. D. 1859.

IT IS HEREBY ORDERED, That in all civil actions hereafter to be tried in this Court, if judgment shall be rendered in favor of the defendant, he shall take judgment for his costs, and the attorney of record for the plaintiff shall be personally responsible to the Clerk, for the costs made by the plaintiff only. If judgment shall be given in favor of the plaintiff, he shall take judgment for his costs, and the attorney of record for the defendant shall be personally responsible to the Clerk, for the costs made by the defendant only.

In appeal cases, the appellant shall be regarded as the plaintiff, and the appellee as the defendant, for the purposes of this rule.

AND IT IS HEREBY FURTHER ORDERED, That in all original civil actions for debt, or upon contract, of trover or replevin, hereafter to be tried in this Court, unless the plaintiff shall recover the sum of at least one hundred dollars, he shall not be entitled to judgment for costs. But this rule shall not apply to cases where the plaintiff's demand is reduced by the proving of a set off, not shown to have been received in payment of the specific demand upon which the suit is brought.

AND IT IS HEREBY FURTHER ORDERED, That the rule adopted at

the January Term, 1852, be and is henceforth modified, in so far that judgment shall not be entered up by the Clerk, except upon motion made in open Court, or before a Judge at Chambers, with notice to the opposite party.

By order of the Court.

JNO. E. BARNARD, Clerk.

SEPTEMBER 15TH, A. D. 1859.

IT IS HEREBY ORDERED, That the traveling fees in the service of process in all civil cases shall be payable in advance to the Marshal, or the Sheriff, as the case may be.

By order of the Court.

JNO. E. BARNARD, Clerk.

JANUARY TERM, A. D. 1860.

IT IS HEREBY ORDERED, That in all cases where a counsel proposes to take evidence out of Court, and does not approve of the evidence after it has been taken, he shall then state whether he intends to withdraw it or not, in order that the opposite party may have the opportunity of making the witness his own; but if he does not withdraw the evidence, and it goes on to the files of the Court, either party shall have the privilege of using it as his own on the trial of the cause, the costs in that case to abide the result of the suit.

By order of the Court.

JNO. E. BARNARD, Clerk.

JANUARY TERM, A. D. 1861.

IT IS HEREBY ORDERED, That in the settlement of the estates of deceased persons, in Probate Court, in case of a distribution of real or personal property, in the hands of an executor or administrator, whether by agreement or under an order of Court, there shall be filed a written statement, showing distinctly what part of the property has been awarded to each claimant separately; which statement shall be signed by the parties interested, or their legal representatives, and it shall be the duty of the executor or administrator, unless the Court shall otherwise specially direct, to prepare such statement for filing of record.

By order of the Court.

JNO. E. BARNARD, Clerk.

IT IS HEREBY ORDERED, That in every suit hereafter to be instituted in this Court, on behalf of a minor, by his *prochein amy*, or next friend, it shall be incumbent on the party desirous of suing in that capacity, to obtain the sanction of the Court, or of one of the Justices thereof, before the issuing of process.

By order of the Court.

JNO. E. BARNARD, Clerk.

MARCH 19, A. D. 1861.

IT IS HEREBY ORDERED, That in every case of an appeal from the decision of a Circuit Judge, at Chambers, in pursuance of Section 1007 of the Civil Code, if the appeal be taken solely on grounds of law, it shall be incumbent on the party appealing to file the grounds of his appeal in writing, with the Circuit Judge, whose duty it shall be to forward a true copy of the same to the appellate Court. But if the appeal shall be taken generally, from the decision of the Circuit Judge, it shall not be necessary to record the grounds of the appeal.

By order of the Court.

JNO. E. BARNARD, Clerk.

MAY 1st, A. D. 1861.

IT IS HEREBY ORDERED, That in case of an appeal from any order made or judgment given, by a single Justice of this Court, or by a Circuit Judge, sitting as a Court of Probate, such appeal must be taken within ten days after the making of the order, or the rendition of the judgment which is appealed from.

By order of the Court.

JNO. E. BARNARD, Clerk.

APRIL TERM, A. D. 1863.

IT IS HEREBY ORDERED, That in any Probate cause hereafter to be heard, either before the full Court, or before a judge at Chambers, no attorney's fees whatever shall be allowed.

By order of the Court.

JNO. E. BARNARD, Clerk.

JULY TERM, A. D. 1863.

IT IS HEREBY ORDERED, That in every case of an appeal from the decision of a Circuit Judge, in any matter of probate jurisdiction, either party shall be at liberty to introduce further evidence, in addition to that previously presented and recorded in the Court below. The record of the evidence given before the Circuit Judge shall, in all such cases, be certified up to the appellate Court, and shall be read as evidence, subject to legal exceptions.

By order of the Court.

JNO. E. BARNARD, Clerk.

OCTOBER TERM, A. D. 1863.

IT IS HEREBY ORDERED, That no process to compel the attendance of a witness in any civil suit, will be granted by the Court unless it shall appear that the traveling fees, both going and

returning, and fees for attendance up to the time of application, have been paid or tendered to such witness.

By order of the Court.

JNO. E. BARNARD, Clerk.

APRIL TERM, A. D. 1865.

IT IS HEREBY ORDERED, That in every case of an appeal from the decision of a Judge sitting as a Court of Probate, pursuant to the provisions of "An Act to authorize the trying of issues of fact in matters of Probate by a jury," approved December 31st, 1864, it shall be incumbent on the party appealing to file with the Clerk of the Appellate Court his affidavit, setting forth the matters necessary to establish a right to appeal, and also to file with such Clerk a written motion specifying the issue or issues of fact which he desires to have tried by a jury, and asking that the same may be so tried.

By order of the Court.

L. McCULLY, Clerk.

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ABSCONDING DEBTOR.

Unless a thorough search of the vessel, previous to passing the boundaries of the jurisdiction, had been shown, the master held liable for the debt, under Section [651](#) Civil Code. *Holiday v. Stott*, [381](#); *ib.*, [395](#).

A party arrested as an absconding debtor, and affidavits filed both by the defendants and the plaintiff regarding the validity of the claim, the Court heard evidence, that it might judge *prima facie* whether there was any indebtedness. *King v. Huntley*, 457.

Construction of the Statute, Section 953 Civil Code, sustained by the Passport Law, Article [41](#) Civil Code. *Ib.*, [457](#).

ACCOUNTS.

Where a part owner of a ship had furnished the supplies for the said vessel from his own stock in trade, at the lowest market rates, with the knowledge of and without objection by the other owner, the latter must be held in law to have waived his right to open up the *accounts* of said disbursements.

Wilcox & Hanks v. Marshall, [296](#).

And where said part owner, acting for the others, furnished them from time to time with accounts of the disbursements: *Held*, that the furnishing of the accounts must be regarded as notice and equivalent to an express demand for interest from the time the accounts were so furnished. *Ib.*, [296](#).

The expenses of making up the accounts between the ship and crew to be borne by the owners. *Warren et al. v. "Benj. Rush,"* [468](#).

Accounts having been retained for a length of time, without objection as to their correctness, having had opportunity, the party held to have waived the right to make objection, and they were accordingly held conclusive against him.

Dudoit v. Spencer, [493](#).

Duty of the owner, or his agent, to make out the accounts of seamen in the whaling business. *Rice v. Spencer*, [502](#).

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Pustau et al. v. Rixman, [730](#).

ACTION ON THE CASE.

Maintainable by the widow for consequential damages, resulting from the death of her husband, caused by the wrongful act of the defendant.

Kake v. Horton, [209](#).

ADMIRALTY JURISDICTION.

Jurisdiction declined, where the breach of contract took place in a foreign country, where the witnesses to all the facts and circumstances resided.

Wetherbee v. Schooner "Golden State," 78.

A service rendered by the libellants to the respondents, on a shoal in the open ocean, (outside the limits of any State or Government,) held to be a maritime service, cognizable in Admiralty.

Phillips et al. v. Rawlins and Fetters, 150.

The Courts of this Kingdom, sitting in Admiralty, will exercise jurisdiction in suits between foreigners, in cases of special necessity, and in order to prevent a failure of justice.

Enos v. Soule, 332; *Warren et al. v. "Benj. Rush,"* 468; *Ib.,* 478.

By the 21st Article of the French Treaty, the jurisdiction of crimes committed on the high seas, as well as of marine torts, "as causes of action for damages" on the Admiralty side of the Court, remains as it was before the treaty was made.

Enos v. Soule, 332.

The consent of a foreign representative is not necessary to confer jurisdiction.

Ib., 332.

In a case of special necessity and hardship, the protest of the Consul of the United States, to the exercise of Admiralty jurisdiction, overruled.

Ib., 332; *See, also, Vieira v. Soule,* 346.

The question of Admiralty jurisdiction by the Courts of this Kingdom, under the 21st Article of the French Treaty, is governed as well by the general maritime law as by the provisions of this article.

Young v. Phillips, 349.

Jurisdiction affected, to some extent, by the French Treaty.

Ib., 349; *Warren et al. v. "Benj. Rush,"* 468; *Ib.,* 478.

But where the termination, as well as the inception, of the contract is at a port of these Islands, jurisdiction will be entertained; or if the seaman has been forced to leave his vessel, having a just cause of action.

Young v. Phillips, 349; *Warren et al. v. "Benj. Rush,"* 468.

The approval of a foreign consul does not confer jurisdiction, already inherent in our Courts.

Young v. Phillips, 349.

A creditor of a person conveyed out of the Kingdom, contrary to Sec. 651 Civil Code, may institute a suit in Admiralty, against the master, to recover his debt.

Huliday v. Stott, 387.

To limit the jurisdiction of a Court of Admiralty, under the 21st Article of the French Treaty, in suits by foreign seamen, it must appear that the term of service has not yet expired.

Warren et al. v. "Benj. Rush," 468.

The cause of difference giving rise to the suit must relate to the internal order of the vessel, and the parties be exclusively of the ship's nationality.

Ib., 468.

The provisions of the 21st Article of the French Treaty do not lessen the jurisdiction of the Courts, in adjudicating upon contracts for mariners' wages.

Ib., 478.

ADOPTION.

By failure to prove the adoption, according to the Statutes of 1846, judgment was entered in favor of defendant, in ejectment brought by the alleged adopted son of the former owner of the land, who died in 1848.

Abenela v. Kailikole, 660.

AGENCY.

One of the several part owners of ships engaged in the whaling business, acting as agent to purchase supplies and outfits, will not be permitted to take beyond

- a reasonable compensation for his services, or that agreed upon, nor to hold any profits incidentally obtained. *Wilcox & Hanks v. Marshall*, [296](#).
- An agent or trustee can not become the purchaser of property confided to his care. Such sale not absolutely void, but voidable by the *cestui que trust*. *Ib.*, [296](#).
- Although agents are not legally entitled to any incidental profits, yet where they had exercised due diligence in making their contracts of freightments, their principals could not vacate their contracts, if at some other period, before or after, a less rate of freight had attained. And if put on board their own ships, the lowest rate of freight in the market only could be charged. *Ib.*, [296](#).
- Owners of a vessel held responsible, in damages, for the wrongful acts of the master towards the crew, in the conduct of the voyage. *Makaula et al. v. brig "Wailua,"* [356](#).
- An agent, acting within the usual scope of the business entrusted to him, binds the principal by his acts. *Spencer v. Bennet et al.*, [415](#).
- Any express or unusual limitations can not affect the right of the purchaser, without notice. *Ib.*, [415](#).
- An authority to sell implies one also to sell on a credit, if usual. *Ib.*, [415](#).
- Notice of suit to the agent in this country, as effectual as if served upon the non-resident defendant personally. *Purdy v. Janion*, [453](#).
- Incumbent upon agents of whaleships to make up, at the expense of the owners, the accounts between the ship and crew. *Warren et al. v. "Benj. Rush,"* [468](#).
- An agent, holding himself out as a principal, incurs the liability to the same extent as if he were principal. *Montgomery v. Montgomery*, [677](#).
- The general authority of the master of a vessel to conduct a whaling and trading voyage for a limited period of time, does not empower him to establish sub-agencies at different points beyond the period expressly set forth. *Cuplan v. Hoffschlaeger & Stapenhorst*, [691](#).
- The principal, by receiving the proceeds thereof, may have ratified the sale of goods, but does not thereby ratify a contract, made without authority, to pay certain wages for services rendered in such sale. *Ib.*, [691](#).
- Such unauthorized person is entitled, equitably, to a fair compensation for his services, but can receive nothing upon a contract made with an agent who has exceeded his authority. *Ib.*, [691](#).
- Where, by the very nature of the transaction, a written authority is known to exist, persons dealing with the agent are put on inquiry. *Ib.*, [691](#).

AGREEMENT.

- Private agreements, as to pasturage, between the tenant and landlord, cannot affect the landlord's lessee of land, unless he had special notice, and agreed to respect its terms. *Oni v. Meek*, [87](#).
- Evidence to give a construction to an agreement is inadmissible, it being clear and explicit in its terms, and free from ambiguity. *Laanui v. Puohu and Carsley*, [161](#).
- After an agreement has been reduced to writing, it is competent to the parties, at any time before breach of it, by a new compact, not in writing, to annul, vary or qualify the former agreement, and thus make a new contract. *May v. Haalelea*, [191](#).
- When no time is specified in an agreement, at which an account shall be made, the bill should allege demand and refusal. *Keelikolani v. Robinson*, [436](#).
- An agreement showing that equal proportions for repairs on the premises shou'd be paid by the parties, and one of said parties having made the repairs at his

own expense: *Held*, that the application of the share of receipts of the other party was properly made by the party incurring the expenses.

Ib., [436](#).

Under an agreement with the ancestor, by which a party occupied, for a long period, a certain wharf premises, to be improved at joint expense, and the profits arising therefrom to be equally divided between them, the heirship of the complainant having been proved, the respondent was decreed to account to said complainant for all monies received for the use of said premises.

Ib., [522](#).

A parole agreement, not to be performed within a year, cannot form a ground of defence to a suit for services rendered, based on a *quantum meruit*.

Wakeman v. Hakaleleponi, [153](#).

APPEAL.

In admiralty, may be taken within six months after decree, unless it is fully executed, and operates as a stay of execution.

Coaly et al. v. 1,200 bbls. oil and 15,000 lbs. bone, [55](#).

No bar to libellant's right of appeal, that an order to dispose of libelled property, as decreed by the Court below, has been procured.

Ib., [55](#).

Proceedings of an appeal from District Justices regarded with less technical precision than on an indictment.

Rex v. Gillingham, [150](#).

ARREST.

To validate the arrest of a deserting seaman, it is not required that a warrant should first be issued, upon oath, unless the deserter were sheltered in a private house.

In re Flanchet, [112](#).

To warrant the arrest of an absconding debtor, it is not necessary to aver that he departs the Kingdom *in order* to avoid payment, but, that he is about to quit without leaving any provision for the payment of the debt.

King v. Huntley, [457](#).

ASSAULT AND BATTERY.

Rule for assessing damages for bodily injury endured by the plaintiff.

Coffin v. Spencer, [23](#).

An unjustifiable and excessive beating, inflicted on a seaman by the mate, in the presence of the master, renders the latter responsible in damages to said seaman for the assault.

Burrmeister v. Seyer, [255](#).

ASSESSOR.

Tax-collectors not responsible for the non-feasance or mal-feasance of assessors or any other officers.

Waterhouse v. Webster, [259](#).

ASSIGNMENT.

An assignment of lands, belonging to the intestate, made by the guardian of the heir to the widow, which she accepted in satisfaction of claim of dower, forms a title in equity sufficient to repel the complainant's claim, and would authorize the Court to decree a conveyance of the legal estate from the heir, if it were in him.

Laanui v. Puohu & Carsley, [161](#).

ATTACHMENT.

A party respondent, kept in custody under process of attachment for non-compliance with the final decree of a Court of Chancery, prayed to be discharged, alleging want of funds—having remitted a large amount, subsequent to the filing of the bill, to a foreign country: *Held*, that a contingent liability having arisen by the institution of the suit, it was his duty to have kept his property in the Kingdom, etc.

In re Morrison, [292](#).

ATTORNEY AT LAW.

- Is admitted to practice during good behavior. In re *Campbell*, [27](#).
 Powers of, very extensive. *Ib.*, [31](#).
 Striking from the roll not a perpetual disability. *Ib.*, [34](#).
 The same person, performing the duties of Attorney and Advocate, is entitled to compensation for services rendered. *Montgomery v. Montgomery*, [677](#).
 The withdrawal of a counsel during the progress of the cause, by mutual accord, does not justify the client in refusing to pay the retainer. *Ib.*, [677](#).

AWARD OF LAND COMMISSION.

- The award of a lot of land does not extinguish a right of way passing through a portion of such lot. *Jones v. Meek*, [9](#).
 The certificate of an award of the Land Commission, with its accompanying survey, are admissible in evidence, and are *prima facie* evidence of the right of the party in whose favor the certificate is issued. *Kalama v. Kekuanaoa and Ii*, [202](#).
 The term *kuleana noho pa* means a right of residence during the lifetime of the party in whose favor the award was made. *Ib.*, [202](#).
 An award by the Board of Land Commission may be examined, to ascertain whether error existed or not upon the record of adjudication of the said Board, but not for the purpose of reviewing the decision of the Commission. *Bishop v. Namakalaa and Kahinukawa*, [238](#).
 Upon payment of the usual commutation: *Held*, complainant entitled to a fee simple patent from the Government, said patent to be based upon the award, made in favor of her co-tenant and bailiff. *Keelikolani v. Robinson*, [522](#).

BANKRUPTCY.

- A failure under the law of 1848, defined to be a refusal or inability to make payment of just demands for ten days after maturity; whereupon the party may be declared bankrupt. *Fallon v. Robinson and Walker*, [227](#).
 Where a person had committed acts of bankruptcy more than ten days previous to being declared a bankrupt: *Held*, that any transfer of property then made, (except upon good consideration to a *bona fide* purchaser without notice,) is void by the statute, etc. *Ib.*, [227](#).

BRANDS OF ANIMALS.

- A brand is not conclusive evidence of the ownership of an animal. *Davis v. Green*, [367](#).
 The law regulating brands does not apply to the wild herds roaming the sides of Maunakea. *Ib.*, [367](#).

CATTLE.

- Wild herds of, on the sides of Maunakea, known as the "mountain cattle of the King and Government" are not animals *feræ naturæ*. *Davis v. Green*, [367](#).
 The grantee of these cattle must not enter to capture them on the lands of private owners without their consent. *Ib.*, [367](#).
 Nor can he convert the cattle of private owners found *unbranded* on lands leased by him; neither have the owners of private lands the right to convert these Government cattle if found on their lands. *Ib.*, [367](#).

CIRCUIT COURTS.

- As to their jurisdiction and powers. *Purdy v. Janion*, [453](#).

COLLECTOR GENERAL OF CUSTOMS.

Where the requisites of the law had been complied with, upon a refusal by the Collector to permit the entry of goods, a peremptory mandamus ordered to be issued. *Harris v. Goodale*, 130.

Peremptory mandamus issued to the Collector, who had refused to receive the duties tendered him by the purchasers of the hull of a vessel, sold in bond at public auction, and which had been seized as for a violation of the revenue laws. *Foster and Johnson v. Collector General*, 197.

Where goods have been landed from a ship reported to be unseaworthy, the Collector can require security for the duties on such goods—as well as the ship, whatever they may be, as ascertained upon subsequent enumeration and valuation at a public sale. *Ib.*, 197.

COMMON CARRIERS.

Subject to modification by special contract, owners of vessels, employed as common carriers, are answerable for the loss or damage of property shipped, unless such loss or damage resulted from unavoidable accident.

Asegut et al. v. King et al., 733.

In ordinary cases, the law does not require the adoption of extraordinary measures of precaution by the master in the management of his vessel.

Ib., 733.

CONSULS.

See FOREIGN REPRESENTATIVES AND CONSULS.

CONTEMPT.

Not necessary that the act should be done in open Court. Publications libeling Superior Courts, punished as contempt. *In re Campbell*, 27.

CONTRACTS.

The voyage being described in the shipping articles as a whaling voyage, a change to a trading or freighting voyage is a violation of the contract.

Brooks v. Enberg, 141.

Parol evidence can not be admitted to vary the contract of wages in the shipping articles. *Ib.*, 141.

The legal age at which a person becomes bound for goods furnished him, must be governed by the *lex loci contractus aut actus*. *Wood v. Green*, 168.

A new contract may be created between parties, based upon a former agreement in writing, to be proved partly by the written agreement, and partly by the subsequent verbal terms—the new contract being agreed upon before breach of the first agreement. *May v. Haalelea*, 191.

If one contracts to labor for a specified term, and leaves the service of the employer, without cause, before the expiration of the term, he cannot recover for the time he has actually labored. *Hanuu v. Williams et al.*, 233.

As between the seller and buyer, it is not the mere inadequacy of price, unaccompanied by other circumstances, which will avoid the contract in a Court of Equity. *Kapaakea et al. v. Morrison and wife*, 272.

Contracts of freightments, made at the time by the agents on the most advantageous terms, cannot be vacated by the principal, notwithstanding at some other period, before or after, a less rate of freight had attained.

Wilcox and Hanks v. Marshall, 296.

The termination as well as the inception of a mariner's contract being at a port of these Islands, and the mariner not having bound himself, by his contract of shipment, to resort to no tribunals but those of the home forum; the Court entertained jurisdiction of the suit. *Young v. Phillips*, 349.

For a breach of the contract of shipment, by the master, the owners held liable.
Makaula et al. v. Brig "Wailua," 356.

The accounts under the contract of shipment ordered to be closed at a fixed date, and a *quantum meruit* paid for the ensuing period of service. *Ib.*, 356.

A public officer, acting in his official capacity, is not personally liable on contracts made within the line of his public duties.

Richardson v. Harding, 433.

The shipping contract being determined by its own terms, the seaman cannot be arrested, under treaty stipulations, upon the consul's requisition.

Warren et al. v. Bark "Benj. Rush," 468.

A contract of shipment, terminating here, does not come within what is meant by "matters of difference touching the internal order of the vessel," as expressed in the French Treaty. *Ib.*, 478.

In the absence of any contract with the seaman, the lay should be the highest, out of the port, for good men in the same capacity. *Rice v. Spencer,* 502.

An entire contract must be fulfilled before any advantage can be claimed under it by the heir; and, consequently, no proportionate part of the estate could be conveyed as for a fulfillment *pro tanto*, arising from labor performed by the ancestor, or for partial payments made. *Burbank v. Wood,* 591.

DAMAGES.

Suits for damages by seamen, founded on trivial causes, to be discountenanced.
Dodge v. Hempstead and Heppington, 18.

Rule in assessing for assault and battery. *Coffin v. Spencer,* 23.

Damages awarded to chief mate of a whaleship who had been wrongfully dismissed from service before the commencement of a voyage.
Harris v. Williams, 124.

Damages in the shape of wages, awarded to the persons employed, under the contract of shipping for a whaling voyage, where the voyage, by the act of the master, had been changed to a trading or freighting voyage.
Brooks v. Enberg, 141.

The husband having come to his death by the wrongful act of the defendant :
Held. that the widow could maintain an action in the case to recover consequential damages therefor. *Kake v. Horton,* 209.

Said damages to be based upon the plaintiff's loss of support, deprivation of society, etc., as measured by the husband's station in life, age, and ability of earning a livelihood. *Ib.*, 209.

Damages awarded for personal suffering, in consequence of the non-fulfillment of the contract by the employer, the Court awarding the value of the labor actually rendered to the defendants. *Hanuu v. Williams et al.*, 233.

The master of a ship who permits his mate to inflict an unjustifiable and excessive beating in his presence upon a seaman, is responsible to said seaman in damages for the assault. *Burrmeister v. Seyer,* 255.

Where a long course of oppression and abuse had been persisted in, by the master, toward the seaman, the libellant received heavy damages in the Admiralty. *Enos v. Sowle,* 332 ; *Vieira v. Sowle,* 346.

Damages decreed, against the owners of a vessel, for the wrongful acts of the master towards the crew. *Makaula et al. v. Brig "Wailua,"* 356.

The principle of *cy præs* adopted in assessing damages, where parties had transacted business with each other in a loose manner, rendering it difficult for the Court to measure the amount of pecuniary damage sustained.

Dudoit v. Spencer, 493.

DEED.

Recourse was had to the English original, where the legal signification of the terms of a deed could not be expressed in Hawaiian without great difficulty.

Haulelea v. Montgomery, 62.

As between the parties, acknowledgement and registry of a legal conveyance are not necessary.

Laanui v. Puohu and Carsley, 161.

A deed duly registered is good as against a prior unregistered deed, if the second purchaser have no notice of the prior conveyance.

Rires v. Makulu, 166.

Love and affection, for brothers and sisters, nephews and nieces, or heirs at law, a good consideration.

Ib., 166.

The facts on which a trust arises may be shewn, by parole proof, in opposition to the language of the deed.

Montgomery v. Montgomery, 563.

A conveyance of property is not *ipso facto* void, though the person making it may be under a prosecution for embezzlement.

Jarrett v. Manini, 662.

Whether a person, who was in trouble and anxiety of mind, had a right to convey his property to a trustee, for the benefit of his son, depends upon the fact, whether he was owing debts which he was unable to pay, or whether the transfer was made to defraud his creditors.

Ib., 662.

DEMAND.

When no time is specified in an agreement at which an account shall be made the bill should allege demand and refusal.

Keelikolani v. Robinson, 436.

On the part of the libellants, for a settlement and payment of wages, indispensable before suit brought.

Warren et al. v. Bark "Benj. Rush," 478; *Rice v. Spencer*, 502.

The rendering of an account to the respondent, by which ten months' wages is claimed, is sufficient for the purpose of making a demand.

Dudley v. Wilkinson, 644.

DEMURRER.

In an action for an account of receipts and profits, and also for possession of certain premises: *Held*, that the bill should allege that respondent took possession under his contract, and that he *used* the premises, deriving profits from their use.

Keelikolani v. Robinson, 436.

Held, also, that the present possession must be alleged to authorize a decree of surrender of possession.

Ib., 436.

When no time is specified in an agreement at which an account shall be made: *Held*, that the bill should allege that a demand for an account has been made and refused.

Ib., 436.

A derivative title must be clearly and fully set forth, to compel an answer from the respondent in possession.

Ib., 436.

General demurrer overruled, when there is any equity in the bill.

Ib., 514.

General demurrer to the bill, that at the early settlement of these Islands by foreigners there was no law of inheritance, overruled.

Ib., 514.

DERELICT.

See SALVAGE.

DESERTION.

A seaman leaving his ship, without objection by the master, is not guilty of such desertion as works a forfeiture of wages, antecedently earned.

Dodge v. Hempstead and Heppington, 18.

No warrant required for the arrest of a deserting seaman, unless sheltered in a private house. *In re Flanchet*, 112.

Under the United States Act of 1790, the seaman must be shown to have quitted the ship without leave, by an entry in the log-book, been absent forty-eight hours, and to have left with an *intention* to desert.

In re Evans, 311; *Aikake et al. v. Ship "Hibernia,"* 463.

The usage, that the seaman is bound to remain eight days by the vessel, after she enters port, must be well established; otherwise, his leaving during that period would not be a desertion. *In re Evans*, 311.

A deserter, once arrested and held for his desertion, cannot be re-arrested and held the second time for the same act of desertion, without violation of the solemn stipulations, made by treaty, with the United States Government on behalf of its seamen. *In re Kauffman*, 313.

DEVIATION.

An exchange of articles for provisions for the ship, or trading which does not interfere with the original objects of the voyage: *Held* not to be a deviation, etc. *Brooks v. Enberg*, 141.

DISMISSAL FROM SERVICE.

Damages awarded to chief mate of a whaleship who had been wrongfully dismissed from service before the commencement of a voyage.

Harris v. Williams, 124.

DOWER.

The wife of a lunatic, having agreed to release her right of dower in the entire real estate of her husband, upon receiving the fee simple of certain premises, also applied to the Court that the said property might be reserved for her children as well as herself; was decreed a life estate only, and remainder to the children. *Reynolds v. Barnard et al.*, 72.

Assignment of lands belonging to the intestate, made by the guardian of the heir to the widow, accepted in satisfaction for her claim of dower, forms a title in equity as against the heir. *Laanui v. Puohu and Carsley*, 161.

By the Act of 7th June, 1848, reserving certain lands to the then reigning sovereign, her Majesty the Queen has the right to dower in said lands—there being nothing in said Act taking away such right, and nothing in any law of the Kingdom, making the matrimonial rights of the wife of the King any less or different from those of the wife of any private gentleman.

Estate of his Majesty Kamehameha IV., 715.

In his Majesty's private estate, other than the lands reserved to the Crown by the Act of 1848, her Majesty Queen Emma is entitled, as statutory heir, to one-half, instead of dower—the latter right being merged in the superior right of heir. *Ib.*, 715.

DUTIES.

Where goods have been landed, from a ship reported unseaworthy, under a permit from the Custom House, without payment of duties, the transaction may be regarded as an incomplete entry; and the Collector can require security for the duties, whatever they may be, as ascertained upon subsequent enumeration and valuation, at a public sale.

Foster and Johnson v. Collector General of Customs, 197.

An agriculturist purchasing, in bond, articles included in that portion of the 517th Section of the Civil Code denominated the "Free List," from the original consignee, can not be regarded, as the importer of the goods; and, therefore, is not exempted from the payment of the duties.

Cording and Wilson v. Minister of Finance, 727.

EASEMENT.

See RIGHT OF WAY.

EJECTMENT.

A certificate of an award of the Land Commission, with its accompanying survey, is admissible in evidence; and, when both appear to be genuine, is *prima facie* evidence of the right of the party in whose favor it is issued.

Kalama v. Kekuanaoa and Li, Guardians, 202.

Held, that the term *kuleana noho pa* means nothing more than a right of residence during the lifetime of the party. *Ib.*, 202.

Where error was alleged, in the making of an award by the Board of Land Commissioners, the Court permitted evidence to be deduced, in order to ascertain whether or not such error existed upon the record of adjudication.

Bishop v. Namakalaa and Kahinukawa, 238.

In ejectment, a tenant can neither deny his landlord's title, nor set up an outstanding or paramount title in himself or a third party.

Keelikolani v. Robinson, 514.

EQUITY.

As between the seller and buyer, it is not the mere inadequacy of price, unaccompanied by other circumstances, which will avoid the contract in a Court of Equity.

Kapaakea et al. v. Morrison and Wife, 272.

Inadequacy of price may be sufficient ground for refusing to enforce specific performance of a contract, when it would not be for setting aside a sale.

Ib., 272.

A party respondent, attached for non-compliance with the final decree of a Court of Equity, prayed to be discharged, alleging want of funds, and that he had remitted a large amount, subsequent to the filing of the bill, to a foreign country: *Held*, that a contingent liability having arisen, it was his duty to have kept his property in the Kingdom.

In re *Morrison*, 292.

A Court of Equity will enforce the exercise of mutual good faith between parties, where they have respectively assumed relations towards each other which peculiarly require it.

Montgomery v. Coady, Executrix, etc., 322.

A Court of Equity will exercise a sound discretion in taking jurisdiction of a case cognizable at law; and, having jurisdiction, for purpose of discovery, will also give relief.

Keelikolani v. Robinson, 436.

The Court, sitting as a Court of Equity, adopted the principle of *cy præs* in assessing damages, where it was difficult for the Court to measure the amount of pecuniary damage sustained by the party invoking its aid.

Dudoit v. Spencer, 493.

Where there is any equity in the bill, general demurrer overruled.

Keelikolani v. Robinson, 514.

Proceedings at law, imposing restraint upon the disposition of property, as authorized by the Statute, not considered as analogous to the issuing of an injunction in equity.

Montgomery v. Montgomery, 553.

The *cestui que trust* is regarded in a Court of Equity as the real owner; and where the respondent purchased the estate with a knowledge of the trust, the conveyance would be subject to it, and he have a right, in equity, to dispose of the same, and such disposition is binding on the trustee.

Montgomery v. Montgomery, 563.

In equity, so far as may be necessary, real estate, purchased with partnership funds, and held and dealt with as partnership property, will be treated as personal property.

Aldrich, Executor, v. Robinson & Lawrence, 606.

See INJUNCTION.

ERROR.

Upon an assignment of errors, the errors must appear upon the record, and not upon the copies of the papers served upon the party; a plaintiff in error can not assign, for error, matter which he might have pleaded in abatement; nor can he assign, for error, matter contrary to the record.

Hennessey v. Bolles, [184](#).

An exception to the verification of a petition comes too late, when raised on a writ of error.

Ib., [184](#).

Where error was alleged, in making of an award by the Board of Land Commissioners, evidence was adduced to show if such error existed, but not to review the decision of the Commission.

Bishop v. Namakalaa and Nahinukawa, [238](#).

Irregularities, in the proceedings of an inferior tribunal, ought to be excepted to and made the basis of an application for a writ of error, or be brought up, on appeal, in the ordinary way.

In re *Waterhouse*, [241](#); In re *Kamaha et al.*, [444](#).

EVIDENCE.

Parol evidence cannot be admitted to vary the contract of wages in the shipping articles.

Brooks v. Enberg, [141](#).

Evidence held to be not cumulative, when proof of a new, distinct, and material fact, of which no proof had been given at the former trial, though such specific fact had a bearing upon the main fact put in issue by the defense.

Howland v. Jacobs, [155](#).

Certificate of an award of the Land Commission admissible, and is *prima facie* evidence of title.

Kalama v. Kekuanaoa and Ii, Guardians, [202](#).

Where error was alleged, in the making of an award by the Land Commission, evidence was adduced, to show if such error existed, but not to review the decision of the Commission.

Bishop v. Namakalaa and Kahinukawa, [238](#).

To grant a new trial, on the ground of newly discovered evidence, it must appear that the evidence is material and not cumulative, and that no laches have been made.

Weston v. Montgomery, [309](#).

To establish a resulting trust by parol evidence, it must be full, clear and satisfactory.

Montgomery v. Montgomery, [563](#); *Jarrett v. Manini*, [667](#).

The facts on which the trust arises may be shown by parol proof, in opposition to the language of the deed; and is also admissible to define its nature and operation.

Montgomery v. Montgomery, [563](#).

The testator being unable to read, and there being no proof that the will was read over to him, the *onus* is upon the proponent, to show that he had knowledge of its contents.

Ely, Will of, deceased, [649](#).

In such a case, the *onus* is upon the contestant, to show, affirmatively, the undue influence, or suspicious conduct, on the part of the proponent.

Ib., [649](#).

EXECUTION.

In levying upon a ship, or any other chattel owned in common, the officer may levy upon the whole, but he can sell only the individual share of the judgment debtor.

Tillman v. Spencer, [178](#).

A plaintiff in execution does not *ipso facto* become a co-trespasser with the officer, if the latter attaches and sells the property of a third party; but by giving bonds and directing the sale of the entire chattel, including the property of a third party, and receiving only a portion of the gross undivided fund, he renders himself a co-trespasser.

Ib., [178](#).

A tax list in the hands of the tax-collector, is in the nature of an execution—and if good upon its face, protects the tax-collector.

Waterhouse v. Webster. [259](#)

EXECUTORS.

Co-executors not compellable, like co-trustees, to join in receipts; but if they do, are jointly accountable for the money. *Estate of Gill,* [681](#).

If there be several, duty of all to see that the estate, or income arising from it, is applied to the purposes designated by the testator; and if there be negligence, all regarded as responsible. *Ib.,* [681](#).

Where an executor was allowed by his co-executors to use a large sum of money without security, or any effort on their part to compel its investment, the Court refused to discharge a co-executor, until such fund should be accounted for. *Ib.,* [681](#).

Executors may be compelled to perform their trusts, by order of the Probate Courts, under the general provisions of the 851st Section Civil Code.

Ib., [699](#).

FISHERY.

The entire fishing ground, between low water mark and outer edge of coral reef, is the private property of the landlord, subject to certain rights of tenants.

Haalelea v. Montgomery, [62](#).

A purchaser of a certain portion of an *ahupuaa* of land acquires, as appurtenant to said land, a common right of piscary, as a tenant, subject to the rights of the grantor. *Ib.,* [62](#).

Not in the power of the landlord to grant an exclusive right of fishery to the injury of the rights of other tenants. *Ib.,* [62](#).

FOREIGN REPRESENTATIVES AND CONSULS.

To give the consul exclusive cognizance of any tort or crime committed on board of any vessel of his country while in the ports of this Kingdom, the contending parties must be of the same nationality as that to which the vessel belongs. *Enos v. Soule,* [332](#); *Warren et al. v. Bark "Benj. Rush,"* [468](#).

In a case of special necessity and hardship, the protest of the Consul of the United States to the exercise of admiralty jurisdiction overruled.

Enos v. Soule, [332](#); *Young v. Phillips,* [349](#).

Warren et al. v. "Benj. Rush," [478](#).

There is no such comity of nations, as requires the approval or consent of the Foreign Representative, to confer admiralty jurisdiction. In some cases it might be proper.

Enos v. Soule, [332](#); *Vieira v. Soule,* [346](#).

Young v. Phillips, [349](#).

The contract being determined by its own terms, the seaman cannot be arrested, under treaty stipulations, upon the Consul's requisition.

Warren et al. v. "Benj. Rush," [468](#).

The question of the commissions charged by the Consul, and deducted by him from the amount paid the seaman, is a matter between the seaman, or his agent, and the Consul. *Ib.,* [478](#).

FORFEITURE.

A seaman leaving his ship, without objection by the master, does not forfeit his wages, antecedently earned. *Dodge v. Hempstead and Heppington,* [18](#).

It is not every error of judgment, or slight act of disobedience, which will authorize a forfeiture of wages. *Shirley v. Bark "Italy,"* [133](#).

Property being once legally within the Kingdom, as for example, goods landed

from a ship reported to be unseaworthy, without payment of duties, forfeiture cannot attach to it; nor can the title to the property be affected, in the hands of innocent purchasers.

Foster and Johnson v. Collector General Customs, [197](#).

FRAUD.

Except in cases of fraud or mistake, the general rule of law is, that parol evidence is not admissible, to create or modify interests in real estate.

Montgomery v. Montgomery, [563](#).

The fact, that the writer of the will was himself a large beneficiary under it, is not, singly of itself, sufficient to found a presumption of fraud.

Ely, Will of, deceased, [649](#).

GARNISHEE.

Money, passing through the hands of a disbursing agent of the Government, cannot be attached by process of garnishee, by the creditor of a Government official.

Wood v. Elderton, [80](#).

GOODS.

Where, under a permit from the Custom House, goods had been landed from a ship reported to be unseaworthy, in order that a survey might be made on the ship, and where the said goods, as well as the said ship, had been subsequently sold at public auction, without payment of duties, the transaction was held to be an incomplete entry, to be perfected when the sale has fixed the valuation: and it was further held that forfeiture could not attach the property.

Foster & Johnson v. Collector General of Customs, [197](#).

When goods have been distrained by the tax-collector, under Section [503](#) Civil Code, and an order for their sale applied for, the proceedings are unlike a suit at law between parties.

In re Waterhouse, [241](#).

The application for an order to sell is directed to the sound legal discretion of the magistrate.

Ib., [241](#).

Goods distrained by the tax-collector cannot be replevied by the delinquent tax payer—such goods having been found in, and taken from, his possession.

Waterhouse v. Webster, [259](#).

Goods having been set apart, in the vender's warehouse, in a place hired by the vendee: *Held*, that an absolute transfer of possession and property took place.

Green and Hackfeld, Assignees, v. Janion, Green & Co., [428](#).

The owner of the original goods is also owner of the property for which they were given in exchange by an unauthorized agent, and he has the right to retain possession when once it has come to his hands.

Caplan v. Hoffschlaeger & Stapenhorst, [691](#).

An agriculturist purchasing in bond, from the original consignee, goods that are included in what is termed the Free List, Section [517](#) Civil Code, cannot be regarded as the importer of said goods, and therefore is not exempted from the payment of duties.

Cording & Wilson v. Minister of Finance, [727](#).

GUARDIANS AND WARDS.

By the common law of this Kingdom, prior to Act of 4th August, 1851, guardians possessed and exercised the absolute right to dispose of the real and personal estate of their wards.

Laanui v. Puohu and Carsley, [161](#).

Kamehameha v. Kahookano et al., [118](#).

HABEAS CORPUS.

The seaman's relation to a ship which has been abandoned as a hopeless wreck by the master, is dissolved *de facto* and by operation of law, and he can not be arrested as a deserter.

In re Flanchet, [96](#).

- Said mariner is at liberty to enter into a new contract of shipment. *Ib.*, 96.
- Although the arrest of deserters is binding upon the Hawaiian authorities by their treaties with foreign nations, yet, if the party be brought up on *habeas corpus*, the Court is bound, so far as necessary, to go behind the declaration of the Consul and inquire into the facts of the case, for the protection of the party arrested in his legal rights. *Ib.*, 112.
- A seaman will be discharged on *habeas corpus* who has been kept in custody for desertion, unless the requisites of the United States Navigation Act of 1790 have been complied with. *In re Evans*, 311.
- And a usage to compel the seaman to remain eight days by the vessel, after she enters port, must be well established. *Ib.*, 311.
- A deserter can not be re-arrested and held a second time for the same act of desertion. *In re Kauffman*, 313.
- The magistrate having competent jurisdiction to try and decide the case, the Court refused to inquire into the legality of the sentence, further than as to the power to pass it. *In re Kamahu et al.*, 444.
- Whether a sufficient ground was laid for the issue of the warrant cannot be inquired into after conviction and judgment. *Ib.*, 444.

INADEQUACY OF PRICE.

See EQUITY.

INHERITANCE.

- At the early settlement of these Islands by foreigners, there was a common law of inheritance, liable to be modified or defeated, but perfectly good until such an event. *Kedlikolani v. Robinson*, 514.
- In the year 1827, the law of inheritance was not governed by well defined rules, although the general transmission of the possession of lands was well established. *Ib.*, 522.
- By the Act of 7th of June, 1848, the lands reserved to the then reigning sovereign descend in fee; the inheritance being limited to the successors to the throne, each successive possessor having the right to dispose of the same as private property, subject however to the Queen's right of dower. *Estate of H. M. Kamehameha IV.*, 715.
- The descent of his Majesty's private estate, other than the Crown lands, must be governed by the general law of inheritance and distribution: the Queen taking, as statutory heir, one-half of that property. *Ib.*, 715.

INJUNCTION.

- The writ of injunction must be specifically prayed for in the bill, or it will not be granted. *Montgomery v. Montgomery*, 553.
- When the allegations of the bill are based upon the fraudulent conduct of a party, an injunction may be issued as a matter of precaution; and the granting or refusal rest in the sound discretion of the Court. *Ib.*, 553.
- It is usual to dissolve an injunction, where the whole merits of the bill are satisfactorily denied by the answer; yet, there exist exceptions to this general doctrine. *Ib.*, 553.
- If, by the bill and answer, questions of law were involved, of a doubtful character, the injunction should be sustained. *Ib.*, 553.
- The facts alleged in the answer, being derived from personal knowledge, and in direct and explicit denial of the allegations in the bill, the injunction was dissolved. *Ib.*, 553.

INTEREST.

If interest accruing on a loan is payable at certain specified periods, a demand for the payment of the interest, at the time it became due, must be shown, before compounding of the interest can be allowed. *May v. Haalelea*, 191.

Under a plea of the general issue, a defendant, when sued for interest, due on a promissory note, higher than the rate allowed by law, may advance, by way of defense, any matter of fact or of law, without being required to plead the statute specially. *Ib.*, 191.

Where one of the part owners of ships engaged in the whaling business, acting for the others, furnished his accounts and charged interest on advances made by him, without having first made a demand for contribution: *Held*, that the furnishing of the accounts must be regarded as notice, rendering the other owners liable for interest from the time the accounts were furnished.

Wilcox & Hanks v. Marshall, 296.

INTOXICATING LIQUORS.

The law prohibiting the sale of intoxicating liquors to natives of this Kingdom, held to be constitutional, and not in contravention of treaty stipulations with foreign powers. *Rex v. Booth*, 616.

In an indictment for selling spirituous liquors without license, the *onus* is on the defendant, to show that he had a license. *Rex v. Gillingham*, 750.

INVENTORIES.

Not required to be filed until after probate of the will; and not regarded as conclusive evidence of the property that has come to possession or control of the executor. *Estate of W. E. Gill*, 681.

JUDGMENT.

Any judgment, that a plaintiff may obtain, is erroneous and without foundation in law, unless his petition and declaration show a sufficient, legal right of action in him to support a judgment in his favor. *Hennessy v. Bolles*, 184.

JURISDICTION.

See ADMIRALTY JURISDICTION, EQUITY, CIRCUIT COURTS AND PROBATE COURTS.

JURORS.

Affidavits or declarations of jurors, showing misconduct in making up their verdict, rejected. *Howland v. Jacobs*, 155.

And if in any exceptional case such affidavits should be admitted, the names of the jurors would be required, so that counter affidavits might be filed.

Ib., 155.

A mistake in a verdict must appear on the face of the record, and is not to be shown by the statements of any member of the jury.

Weston v. Montgomery, 309.

LAND COMMISSION.

An award of land by the Board of Land Commissioners by metes and bounds, does not extinguish a right of way passing through a portion of the same.

Jones v. Meek, 9.

The certificate of an award, with its accompanying survey, is admissible, and is *prima facie* evidence of the right of the party in whose favor the certificate is issued; and the term "kuleana noho pa," as used by the Land Commission, means nothing more than a right of residence during the lifetime of the party.

Kalama v. Kekuanaoa and li, Guardians, etc., 202.

In a case where error was alleged in making an award, evidence permitted to be adduced in order to ascertain whether such error existed or not upon the record of adjudication. *Bishop v. Namakalua and Kahinukaua*, [238](#).

LAND TITLES.

Bare possession, without title, may enable the plaintiff to maintain his action against a mere stranger or wrong doer, but is not sufficient as against the Government purchaser of the land. *Piikoi et al. v. Kapena*, [15](#).

The certificate of an award of the Land Commission is *prima facie* evidence of title. *Kalama v. Kekuanaoa and Li, Guardians, etc.*, [202](#).

The term "kuleana noho pa" means nothing more than a right of residence during the lifetime of the party. *Ib.*, [202](#).

A derivative title must be fully and clearly set forth.

Keelikolani v. Robinson, [436](#).

A party cannot controvert the title of the person from whom he holds an estate.

Ib., [436](#); *ib.*, [514](#).

An eviction under a paramount title must take place before the lessee or grantee can avail himself of it as a defense on his own contract. *Ib.*, [514](#).

LAWS.

Municipal laws must be restricted in their construction to places and persons upon which and whom the Legislature have jurisdiction and authority.

In re Flanchet, [96](#).

Penal laws are strictly local, though a different rule obtains in relation to contracts. *Ib.*, [96](#).

The law prohibiting the sale of intoxicating liquors to natives of this Kingdom, as contained in Section 1, Chapter [42](#) of the Penal Code, held to be constitutional, and not in contravention of treaty stipulations.

Rex v. Booth, [616](#).

LAWS OF A FOREIGN COUNTRY.

Can not have force to control the sovereignty or rights of any other nation within its own jurisdiction.

In re Flanchet, [96](#).

LIEN.

See *GREEN AND HACKFELD, ASSIGNEES, v. JANION, GREEN & CO.*, [428](#).

LIMITATIONS.

The Hawaiian Statute, limiting the time for the commencement of actions, contains no provision exempting merchants' accounts from the operation of the usual bar. *Pustau et al v. Risman*, [730](#).

Remittances and re-shipments of goods, made by the assignee of a debtor to the creditor, can not be regarded as set-off or payments, so as to prevent the statute bar from running against plaintiff's demand. *Ib.*, [730](#).

Evidence of fraud in making the assignment, could not be held to prevent the operation of the statute. *Ib.*, [730](#).

The limitation imposed by Sec. 1474 of the Civil Code does not apply to wills of testators, deceased prior to the passage of that law. *In re Namino*, [762](#).

MANDAMUS.

The acts of an executive officer cannot be examined by *mandamus*, if such examination would invade his right to the exercise of his own judgment and discretion; but, where the requisites of the law had been complied with, upon

a refusal by the Collector General of Customs to permit the entry of goods, a peremptory *mandamus* was ordered to be issued.

Harris v. Goodale, 130.

A peremptory *mandamus* issued to the Collector General of Customs, who had refused to receive the duties tendered him by the purchasers of the hull of a vessel, sold in bond at public auction, and afterwards seized for a violation of the revenue laws. *Foster & Johnson v. Collector General of Customs*, 197.

The writ of *mandamus* is a matter of discretion with the Court.

In re Waterhouse, 241.

It is the proper remedy, when an inferior tribunal refuses to act upon a subject properly brought before it.

Ib., 241.

It will not lie to control or coerce the *discretion* of a subordinate tribunal.

Ib., 241.

It is not the proper remedy to correct irregularities in the proceedings; they should be made the basis of a writ of error.

Ib., 241.

MINORS.

The father of a minor son can not be held liable for articles furnished the latter on his own individual credit, nothing being shown to raise an implied obligation on the part of the parent.

Wood v. Green, 168.

As to legal age of majority *lex loci contractus aut actus* must govern.

Ib., 168.

MORTGAGE.

In a mortgage of personal property, it being stipulated that the mortgager shall remain in possession until breach of the condition, and before such breach, the mortgager being declared bankrupt, the mortgagee has a right to immediate possession if the mortgage is valid.

Fallon v. Robinson and Walker, Assignees, 227.

NE EXEAT.

As against a departing debtor, sufficient to allege, in the petition, that he is about to quit, without leaving any provision for the payment of the debt.

King v. Hunley, 457.

The Court will examine, if the party arrested desires it, into the merits of the case, that he may not be detained on a groundless claim.

Ib., 457.

NEW TRIAL.

A new trial will not be granted for the reason merely that the verdict is against the weight of evidence, unless it clearly appears either that a mistake has been committed or that injustice has been done through an abuse of power on the part of the jury.

Hewland v. Jacobs, 155.

Proof of certain declarations made by the plaintiff, inconsistent with the facts adduced by said plaintiff at the trial, held not cumulative, and defendant's motion for a new trial granted.

Ib., 155.

Affidavits or declarations of jurors, showing misconduct in making up their verdict, rejected.

Ib., 155.

And if in any exceptional case such affidavits should be admitted, the names of the jurors whose misconduct is relied on would be required to be specified, so that counter affidavits by the opposite party might be filed.

Ib., 155.

A motion for a new trial on the ground of newly discovered and material evidence must be supported by the affidavits of the newly discovered witnesses as to what they can testify.

Will of Hewahewa, 165.

The fact that the amount of the verdict was arrived at by a compromise or mutual adjustment among the jurors is not a ground for a new trial.

Weston v. Montgomery, 309.

A mistake in a verdict must be apparent on the record to warrant the granting of a new trial.

Ib., 309.

To grant a new trial on the ground of newly discovered evidence, such evidence must be material to the issue, and not cumulative, and the party must not have been guilty of *laches*.

Ib., 309.

A new trial ordered in a case where the jury had returned a verdict for a lesser degree of the same offense, when the evidence did not sustain a charge of the lesser degree.

Rex v. Naone, 746.

NON-SUIT.

A motion to set aside the verdict rendered in favor of a plaintiff and enter a non-suit, is a motion addressed to the sound discretion of the Court, as controlled by legal principles.

Tillman v. Spencer, 178.

OFFICER.

A public officer, acting in his official capacity, is not personally liable on contracts made within the line of his public duties.

Richardson v. Harding, 433.

PARTNERSHIP.

A claim for the individual services of one partner cannot be joined with the amount due the firm, for services rendered by the partnership itself.

Wilcox & Hanks v. Marshall, 296.

One of the partners of the firm having rendered extraordinary services in winding up the affairs of the concern, allowed a remuneration for extra labor, not in the nature of a commission, but as for extra expenses incurred.

Hanks v. Wilcox & Coady, 509.

Real estate purchased with partnership funds and held and dealt with as partnership property, will in Equity, so far as may be necessary, be treated as personal property.

Aldrich, Executor, v. Robinson & Lawrence, 606.

The share of a deceased partner in the proceeds of the real estate of the partnership, sold for the purpose of a distribution of assets between the representatives of the deceased partner and the surviving partners, regarded as real estate in the hands of the executor.

Ib., 606.

See AGENCY.

PASSPORT.

See ABSCONDING DEBTOR.

PEOPLE.

The term people, by the 7th Section of the Act of 1850, is synonymous with the term *tenants* as used in the law relating to private fisheries.

Oni v. Meek, 87.

POLICE AND DISTRICT JUSTICES.

No Police or District Justice authorized to cite and apply the provisions of the 14th Section of the Civil Code in any case whatever.

In re Waterhouse, 241.

The application by the Tax Collector for the sale of goods distrained by him, is directed to the sound legal discretion of the Magistrate, and it is his duty to exercise it.

Ib., 241.

PRACTICE.

On motion for a new trial, affidavits or declarations of jurors showing misconduct in making up their verdict will, as a general rule, be rejected.

Howland v. Jacobs, 155.

The motion for a new hearing on the ground of newly discovered and material evidence, must be supported by the affidavits of the witnesses as to what they can testify.

Will of Hewahewa, 165.

An exception to the verification of a petition comes too late when raised on a writ of error; it should be raised at the commencement of the trial.

Hennessey v. Bolles, 184.

Upon an assignment of errors, the errors must appear upon the record, and not upon the copies of the papers served on the party.

Ib., 184.

Plaintiff in error cannot assign for error matter which he might have pleaded in abatement, nor matter contrary to the record.

Ib., 184.

Under a plea of the general issue, a defendant, when sued for interest due on a promissory note, and at a higher rate than that allowed by law, may advance, by way of defense, any matter of fact or of law without pleading the statute specially.

May v. Haalelea, 191.

Mandamus is the proper remedy when an inferior tribunal refuses to act upon a subject properly brought before it, but it is not the proper remedy to correct irregularities in the proceedings, which should be excepted to, and made the basis of a writ of error or of an appeal.

In re *Waterhouse*, 241; in re *Kamaha*, 444.

A respondent in admiralty filing no answer, the libel was taken *pro confesso*, and libellant permitted to support his libel by *ex parte* proofs.

Vieira v. Sowle, 346.

In an action to account for receipts and profits and for surrender of possession, the bill should allege present possession of the premises by the respondent—that he took and used the same under his agreement, deriving profits therefrom; and where no time is specified at which an account shall be made, the bill should allege demand and refusal.

Keelikolani v. Robinson, 436.

To compel an answer from the respondent in possession, a derivative title must be clearly and fully set forth in the bill.

Ib., 436.

Notice of suit to the agent in this country as effectual as if served upon the non-resident principal personally.

Purdy v. Janion, 453.

As against a departing debtor, the petition for a warrant of arrest should allege that he is about to quit the Kingdom without leaving any provision for the payment of the debt; but it is not necessary to aver that the debtor is going abroad to avoid payment.

King v. Huntley, 457.

The Court will examine into the merits of the case, if the party arrested desires it, that he may not be detained on a groundless claim.

Ib., 457.

Allegations as to the time and place of the commission of an offense should be made with greater certainty before the appellate tribunal than may be required to be shown upon the record of a district magistrate.

Rex v. Gillingham, 750.

PROBATE.

See WILL.

PROBATE COURTS.

Full powers are vested in the Probate Courts, under the general provisions of the 851st Section of the Civil Code, to compel executors to perform their trusts; and by a fair construction of the statute, possess all the powers that a Court of Equity could exercise in the premises.

Estate of Gill, 699.

PUBLICATIONS.

Libelling superior Courts punished as contempt. *In re Campbell*, [27](#).

QUANTUM MERUIT.

Where the term of service had expired, and, by fault of the master, the vessel was detained in the Northern seas too late to return to the port where the contract was made; the Court fixed a date at which the contract should be closed, and decreed a *quantum meruit* for the ensuing period of service.

Makaula et al. v. Brig "Wailua," [357](#).

A parol agreement not to be performed within a year, cannot form a ground of defense to a suit for services rendered, based on a *quantum meruit*.

Wakeman v. Hukaleleponi, [753](#).

A party retaining another in his employ for a length of time accepts his services, such as they are, and cannot resist his claim for some wages on the ground of inefficiency.

Ib., [753](#).

REAL ESTATE.

When purchased with partnership funds, and held and dealt with as partnership property, will in Equity, so far as may be necessary, be treated as personal property.

Aldrich, Executor, v. Robinson & Lawrence, [606](#).

RECEIPT.

A receipt given by a seaman is open to explanation.

Roys et al. v. Brig "Wailua," [363](#).

Burrmeister et al. v. Bark "Speedwell," [420](#).

REPLEVIN.

Goods distrained by the tax collector cannot be replevied by the delinquent tax payer.

Waterhouse v. Webster, [259](#).

RIGHT OF WAY.

A claim for a mere right of way, properly speaking, is not a claim for land.

Jones v. Meek, [9](#).

Non-user for five years raises presumption of abandonment.

Ib., [9](#).

The owner of a right of way must so enjoy it as not to interfere unnecessarily with the rights of the owner of the land.

Ib., [9](#).

In the dedication of land to the public use, by the owner of the soil, no particular form is requisite.

Kamehameha v. Kahookano et al., [118](#).

The public must take and enjoy the way *secundum formam doni*.

Ib., [118](#).

A grant by the guardian of a right of way over the land of the ward, is of the same force and effect as if made by the ward on arriving at full age.

Ib., [118](#).

The defendant claiming a right of way across the plaintiff's land, cannot extend the right by using the path in a different manner than had been the usual custom.

Pico v. Richardson, [307](#).

Where a *permissive use* only of a right of way has been allowed, the owner of the premises may revoke the license at his pleasure, and resume the possession of the *locus in quo*.

Kamehameha v. Nahaolehua et al., [378](#).

SALVAGE.

Misconduct of salvors may not only diminish the amount of reward but the entire claim may be forfeited.

Coady et al v. 1,200 Bbls. Oil and 15,000 Lbs. Bone, [34](#).

Persons attached to a ship which has been wrecked may sometimes claim as salvors. *Ib.*, [34](#).

No fixed rule for the rate of salvage, except in extraordinary cases, a moiety of the property saved, the highest compensation. *Ib.*, [34](#).

In cases of derelict it is a general rule in the admiralty to allow a moiety of the property saved to the salvors.

Perrin v. Oil on board whaleship "Hercules," [116](#).

Assistance rendered by the libellants, who were part of a shipwrecked crew, to the respondents on a shoal in the open ocean: *Held* to be a maritime service, and salvage awarded them. *Phillips et al. v. Rawlins & Fellers,* [150](#).

Seamen are ordinarily excluded as salvors unless their connection with the ship is dissolved. *Connor et al. v. Ship "Virginia,"* [171](#).

Amount to be awarded rests in the discretion of the Court; but, where the saving of life was connected with the saving of property, the former act was regarded by the Court in adjudicating upon the measure of the compensation to be paid to the libellants. *Hart & Hansen v. Seven casks of Specie,* [175](#).

SEAMEN.

A seaman leaving his ship without objection from the master, is not guilty of such desertion as works a forfeiture of wages antecedently earned; but if he leaves voluntarily, without cause, he is not entitled to any wages for the remainder of the voyage. *Dodge v. Hempstead and Heppington,* [18](#).

The seaman's relation to a ship which has been abandoned by the master as a hopeless wreck, is dissolved *de facto* and by operation of law.

In re Flanchet, [96](#).

Such seaman is at liberty to enter into a new contract of shipment.

Ib., [96](#).

The chief mate of a whaleship who had been wrongfully dismissed before the commencement of the voyage, was awarded damages.

Harris v. Williams, [124](#).

An error of judgment in not properly securing a whale which has been killed, is not such a dereliction of duty as will warrant a forfeiture of wages.

Shirley v. Bark "Italy," [133](#).

Wages awarded to the seaman where the voyage had been changed from that described in the shipping articles.

Brooks v. Enberg, [141](#).

Seamen are bound to the business of the voyage, and must bestow their best efforts for the preservation of the ship and cargo. Ordinarily they are excluded from claiming as salvors, unless their connection with the ship has been dissolved *de facto* or by operation of law.

Connor et al. v. Ship "Virginia," [171](#).

Burrmeister et al. v. "Speedwell," [420](#).

Coady et al. v. 1,200 bbls. oil and 15,000 lbs. bone, [34](#).

A seaman is entitled to damages from the master of the ship when the said master permits his mate, in his presence, to inflict an unjustifiable and excessive beating upon him.

Burrmeister v. Seyer, [255](#).

A seaman, to be treated as a deserter under the United States Act of 1790, must be shown, by an entry in the log-book, to have quitted the ship without leave, and to have been absent forty-eight hours with an intention to desert.

In re Evans, [311](#).

A usage that the seaman is bound to remain eight days by the vessel after she enters port must be well established.

Ib., [311](#).

A deserting seaman, once arrested and held for his desertion, cannot be re-arrested for the same act of desertion.

In re Kauffman, [313](#).

In the meaning of the French Treaty, a seaman shipping on board a foreign vessel does not become, by that act of shipment, a citizen or subject of the nation to which said vessel belongs. *Enos v. Soule*, [332](#).

A seaman who had been the victim of long continued oppression and persistent abuse from the master of the ship, was awarded therefor large damages in the admiralty. *Ib.*, [332](#); *Vieira v. Soule*, [346](#).

A seaman forced to leave his vessel, and having a just cause of action while attached to it, may maintain a suit in the Courts of this Kingdom—provided he has not bound himself to “resort to no tribunals but those of the home forum.” *Young v. Phillips*, [349](#).

The seamen of a vessel received damages in the shape of wages, from the owner, for the wrongful acts of the master.

Makaula et al. v. Brig “Wailua,” [356](#).

A receipt given by a seaman is open to explanation.

Roys et al. v. Brig “Wailua,” [363](#).

Burrmeister et al. v. “Speedwell,” [420](#).

In cases of shipwreck seamen are entitled to recover their wages out of the proceeds of the wreck saved by them. *Ib.*, [420](#).

Where the voyage had been broken up, a fulfillment of the conditions of the contract of shipment were dispensed with, and a compensation equivalent decreed the seamen. *Ib.*, [420](#).

Coady et al. v. 1,200 Bbls. Oil and 15,000 Lbs Bone, [34](#).

It is the duty of the seamen to render all aid in their power to a ship in distress. Entitled to a reasonable compensation, beyond their wages, for labor done in repairing the ship, and in unloading and restowing the cargo at the port where the repairs were made. *Aikake et al. v. Ship “Hibernia,”* [463](#).

No discrimination in this respect between seamen in the whaling and merchant services. *Ib.*, [463](#).

Duty of owners to keep the ship in a seaworthy condition, and not impose expense of repairs on the seamen. *Ib.*, [463](#).

Seamen, in the whaling business, required to make a demand for settlement before bringing suit for their share of the proceeds of the voyage.

Rice v. Spencer, [502](#).

In the absence of any contract with the seamen the lay should be the highest out of the port, for good men in the same capacity. *Ib.*, [502](#).

A seaman having quitted the vessel during the cruise, with the acquiescence of the master: *Held*, entitled to his share of the catchings in the proportion of the time he was engaged in the service to the whole time of the cruise.

Ib., [502](#).

SET-OFF.

See LIMITATIONS.

SHIP-MASTER.

If by the act of the master the voyage described in the shipping articles as a *whaling voyage* is changed to a trading or freighting voyage, such change is a violation of the contract, for which damages in the shape of wages may be awarded. *Brooks v. Enberg*, [141](#).

The master of a ship, if he permits his mate in his presence to inflict an unjustifiable and excessive beating upon a seaman, is responsible in damages to said seaman for the assault. *Burrmeister v. Seyer*, [255](#).

Where a master had inflicted a long course of oppression and abuse upon a seaman under his command, he was decreed in the Admiralty to pay heavy damages. *Enos v. Soule*, [332](#); *Vieira v. Soule*, [346](#).

Where the master of a vessel had conducted the voyage in such a manner as to bring hardship and suffering upon the crew, and to have caused a loss of time and breach of the contract of shipment, the owners were held responsible in damages for his acts, as being within the scope of his authority.

Makaula et al. v. Brig "Wailua," 356.

Held liable for the debt of an absconding debtor, under Section 651 of Civil Code, unless it can be shown that a thorough search of the vessel had been made.

Haliday v. Stott, 381; *ib.*, 387.

Liability for the debts of passengers departing without passports attaches to the master of a vessel, when he has conveyed such passengers across the exterior line of the exclusive jurisdiction on to the high seas.

Ib., 395.

The taking such a passenger on board beyond the said exterior line of exclusive jurisdiction, with the preconcert of the master, is a violation of the law, Sec. 651, Civil Code.

Ib., 395.

Incumbent on the masters of whaleships to make up, at the expense of the owners, the accounts between the ship and crew.

Warren et al. v. "Benj. Rush," 468.

SHIP OWNERS.

Duty to keep the ship in a seaworthy condition, and when she ceases to be so, they must incur the expense of repairs, and not impose it on the seamen.

Aikake et al. v. Ship "Hibernia," 463.

Liable for expense in making up the accounts between the ship and crew.

Warren et al. v. Bark "Benj. Rush," 468.

Duty of, to make out the accounts of seamen in the whaling business.

Rice v. Spencer, 502.

As to their liability as common carriers. *Asegut et al. v. King et al.*, 733.

SHIPPING ARTICLES.

See *BROOKS v. ENBERG*, 141; *WARREN ET AL. v. BARK "BENJ. RUSH,"* 468.

STOPPAGE IN TRANSITU.

See *GREEN & HACKFELD, ASSIGNEES, v. JANION, GREEN & Co.*, 428.

TAX COLLECTOR.

See *TAXES*.

TAXES.

When goods have been distrained by the tax-collector, under Sec. 503 of Civil Code, and an application is made for an order of sale; it is the duty of the Magistrate to issue the order, if the official requiring it proves that he is the legally appointed tax collector, and that the property seized is at least *prima facie* the property of the person by whom the tax is due, and that it is a reasonable quantity; and that a legal notice of the sale may be given.

In re Waterhouse, 241.

Duties of tax collectors and tax payers defined.

Waterhouse v. Webster, 259.

Tax collector not responsible for the non-feasance or mal-feasance of the assessor.

Ib., 259.

The tax list in the hands of the tax collector is in the nature of an execution.

Ib., 259.

Goods distrained by the tax collector cannot be replevied by the delinquent tax payer.

Ib., 259.

TENANTS.

The landlord cannot alienate a single right conferred by law to the tenant. If said tenant hold his land by virtue of a fee simple title, he is freed from labor formerly due. *Oni v. Meek*, 87.

By the Act of 6th August, 1850, the rights of the tenant to pasture his animals on the lands of the landlord ceased. *Ib.*, 87.

Private agreements as to pasturage, etc., between the tenant and the landlord, cannot affect the rights of the landlord's lessee of land, unless he had special notice, etc. *Ib.*, 87; *Haalelea v. Montgomery*, 62.

A tenant can neither deny his landlord's title in ejectment, nor set up an outstanding or paramount title in himself or a third party; but he must first restore the possession which he obtained from his landlord, and then, as plaintiff, he may avail himself of any title he may have acquired.

Keelikolani v. Robinson, 514.

An award made in favor of one co-tenant, held to be a sufficient basis for the issuing of a patent to the other tenant. *Ib.*, 522.

Under an agreement to occupy and improve certain premises, where the expenses in repairing and improving the same were to be borne by each, and the respondent to account and pay over the one-half of the receipts, he was regarded as a co-tenant. *Ib.*, 522.

TORT.

Where property has been tortiously taken, a party may waive the tort, affirm the sale, and sue simply for the proceeds, alleging that they came to the defendant's hands; and in such action, it is not necessary to show privity between the plaintiff and defendant, as in cases purely *ex contractu*.

Tillman v. Spencer, 178.

A tort disconnected from, and having no relation to the internal order of the vessel, is not within the purview of the stipulation of the French Treaty.

Enos v. Soule, 332; *Vieira v. Soule*, 346.

TREATY.

Construction of the 10th Article of the American Treaty, in regard to the arrest and detention of deserting seamen. *In re Kauffman*, 313.

A tort disconnected from, and having no relation to the internal order of the vessel, is not within the purview of the 21st Article of the French Treaty.

Enos v. Soule, 332; *Vieira v. Soule*, 346; *Young v. Phillips*, 349.

To affect the jurisdiction of the Court under the 21st Article of the French Treaty, the cause of difference giving rise to the suit must relate to the internal order of the vessel, and the parties must be exclusively of the ship's nationality.

Warren et al. v. Bark "Benj. Rush," 468; *ib.*, 478.

To limit the jurisdiction under the said Article in suits by foreign seamen, it must appear that the term of service has not yet expired.

Ib., 468; *ib.*, 478; *Young v. Phillips*, 349.

The law prohibiting the sale of intoxicating liquors to natives of this Kingdom, does not contravene the obligations entered into by the Government in its treaty stipulations with foreign powers.

Rex v. Booth, 616.

TRESPASS.

Bare possession, without title, may enable the plaintiff to maintain an action of trespass.

Piikoi et al. v. Kapena, 15.

A plaintiff in execution becomes a co-trespasser with the Marshal or Sheriff by giving bonds of indemnity to such officer, and directing him to sell an entire

chattel owned in common by the judgment debtor with third parties, although the said plaintiff receive only a portion of the gross undivided fund.

Tillman v. Spencer, 178.

The grantee of the wild unbranded cattle of the King and Government, roaming the sides of Maunakea, is a trespasser, if he enters upon the lands of private parties without their consent for the purpose of capturing the said cattle.

Davis v. Green, 367.

TRUSTS.

A resulting trust may be established by parole evidence, although the grantee denies the trust in his answer; but the evidence must be full, clear and satisfactory.

Montgomery v. Montgomery, 563; *Jarrett v. Manini*, 667.

Trusts resulting by operation of law are expressly excepted from the statute of frauds.

Montgomery v. Montgomery, 563.

A trust may be established when the consideration of a deed moves from the complainant and not from the grantee; and the facts may be shown by parol proof in opposition to the language of the deed; and being proved, parol proof is also admissible to define its nature and operation.

Ib., 563.

The *cestui que trust* is regarded in a Court of Equity as the real owner, for the beneficial interest vests in him; and a respondent purchasing the estate, with the knowledge of the trust, the conveyance will be subject to it; and the beneficiary has a right in Equity to dispose of the estate, and such disposition is binding on the trustee.

Ib., 563.

The main question in determining whether the trust has been created, is upon the sufficiency of the evidence by which it is sought to be established.

Ib., 563.

Where the *cestui que trust* had resumed the legal ownership of the estate, from the hands of the first trustee, and directed to whom a fresh conveyance should be made, without consideration: *Held*, that a resulting trust arose in his favor.

Ib., 563.

The direct mode of creating a trust is by some writing, signed by the party from whom it emanates; yet, there are resulting trusts implied by law from the manifest intention of the parties, and the nature and justice of the case.

Jarrett v. Manini, 662.

If the trust has taken effect it cannot be defeated by a re-conveyance of the property to the party who created it.

Ib., 662.

If the estate be conveyed to a nominal grantee as a gift to the beneficiary, it is the same in principle as if paid for by his own money, and must be regarded as a trust resulting from the original transaction.

Ib., 667.

USAGE AND CUSTOM.

That a seaman is bound to remain eight days by the vessel after she is anchored in port in safety, must be sufficiently established.

In re Evans, 311.

Makaula et al. v. Brig "Wailua", 356.

A usage that seamen should pay the expense of making up the accounts of their voyage, deemed unreasonable.

Warren et al v. Bark "Benj Rush," 468.

In the absence of a stipulated price, the American consular prices are to govern in the settlement of voyages of seamen on American whaleships, who ship to be discharged at this port.

Rice v. Spencer, 302.

VERDICT.

Mistake in a verdict, in order to warrant the granting of a new trial, must be a pure mistake, apparent upon the face of the record.

Weston v. Montgomery, 309.

The fact that the amount of the *verdict* was arrived at by a compromise among the jurors is not a ground for a new trial. *Ib.*, 309.

A verdict on one count, although silent as to the others, is an acquittal as to them; but the jury should respond distinctly as to all. *Ree v. Noone*, 746.

Under the statute, the jury may return a verdict for any lesser degree of the same offense, when the evidence will not warrant a verdict of guilty in the degree for which the prisoner is indicted; but the proof must sustain the charge of the lesser degree. *Ib.*, 746.

VERIFICATION OF A PETITION.

An exception to, comes too late, when raised on a writ of error; it should be raised at the commencement of the trial, and ought not to prevail if raised after judgment in any case. *Hennessy v. Bolles*, 184.

WAGES.

An error of judgment on the part of an officer of a whaleship in not properly securing a whale, which had been killed and anchored in the ice, will not warrant a forfeiture of wages; nor is it every slight act of disobedience which authorizes such a penalty. *Shirley v. Bark "Italy."*

Parol evidence cannot be admitted to vary the contract of wages in the shipping articles. *Brooks v. Enberg*, 141.

Wages cannot be recovered where one leaves the service of the employer before the expiration of the specified term, without cause.

Hanna v. Williams et al, 233; *Dodge v. Hempstead and Heppington*, 18.

In cases of shipwreck, seamen entitled to recover their wages out of the proceeds of the wreck saved by them. *Barrmeister et al. v. "Speedwell,"* 470.

Entitled to a reasonable compensation beyond their wages for labor done in repairing the ship. *Aikuke et al. v. Ship "Hibernia,"* 463.

Cases of mariner's wages arising from contracts terminating here, do not come within what is meant by matters of difference touching the internal order of the vessel, as expressed in the French Treaty.

Warren et al. v. Bark "Benj. Rush," 478.

A demand for settlement and payment of wages indispensable before suit brought. *Ib.*, 478; *Rice v. Spencer*, 502.

In the absence of any contract with the seaman, the lay should be the highest out of the port for good men in the same capacity. *Rice v. Spencer*, 502.

A seaman quitting his vessel during the cruise, with the acquiescence of the master, is entitled to his share of the catchings in the proportion of the time he was engaged in the service to the whole time of the cruise. *Ib.*, 502.

The discharge without trial of a seaman who had been indicted for attempting to fire the vessel, does not preclude the master or owners from setting up such attempt as a defence to his claim for wages. *Mathison v. Daily*, 702.

Such attempt being established, his claim for wages is conclusively barred.

Ib., 702.

WHALE.

A whale had been attacked and wounded by the boats of one vessel, then lost sight of during the night, and again discovered on the following morning, at a distance, with the boats of another vessel in close pursuit. The boats of the first vessel resumed the chase and joined in the final capture, when the whale was reluctantly given up to them after it had been lanced and killed by the boats of the second vessel: *Held*, that it might be regarded as the joint prize of both ships. *Heppington v. Mennen*, 167.

Held, also, that the rule of the common law touching the rights of pursuers and captors of animals *feræ naturæ*, does not apply to cases like the present arising on the high seas. *Ib.*, 167.

WIFE.

The wife of a lunatic, having agreed to release her dower in the real estate of her husband, afterwards applied to the Court to have the said property put into the hands of trustees for the benefit of herself and children. She was decreed a life estate only. *Reynolds v. Barnard et al.*, [72](#).

WILL.

A verbal will made and published antecedent to the enactment of the organic laws of 1846, held to be valid. *Estate of Kaniu*, [82](#).

Probate of will refused where the legal effect of the language used in the instrument differed materially from that used by the testator in delivering his instructions. *Will of Nadal*, [400](#).

The fact that the writer of the will was himself a large beneficiary under it is not, singly of itself, sufficient to found a presumption of fraud or undue influence—and the *onus* is upon the contestant to show affirmatively undue influence or suspicious conduct. *Will of Ely*, [649](#).

The testator being unable to read, and there being no proof that the will was read over to him, *onus* is upon the proponent to show that he had knowledge of its contents. *Ib.*, [649](#).

Loose declarations attributed to the testator, to be received with caution, if not distrust. *Ib.*, [649](#).

The provisions of Sections 1474 Civil Code, do not apply to wills of testators deceased prior to the passage of that law. *In re Nanino*, [762](#).

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